# THE
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## ALLAHABAD SERIES


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ALLAHABAD SERIES

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| 81. Hon'ble Mr. Justice Arun Kumar Singh Deshwal |

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**(2024) 11 ILRA 4**
**APPELLATE JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 12.11.2024**

**BEFORE**

**THE HON'BLE AJAY BHANOT, J.**

Appeal U/S 37 of Arbitration and Conciliation Act 1996 No. 423 of 2024

**N.H.A.I. ...Appellant**
**Versus**
**Dwarikesh Sugar Industries Ltd. & Anr. ...Respondents**

**Counsel for the Appellant:**
Pranjal Mehrotra

**Counsel for the Respondents:**
Tarun Agrawal

**Civil Law - Arbitration and Conciliation Act, 1996 - Section 34 - Right to Fair Compensation and Transparency in Land Acquisition in Land Acquisition, Rehabilitation and Resettlement Act, 2013 - Section 26 - In impugned order, learned court below remanded matter to arbitrator for fresh consideration and found that amount of compensation was not computed in light of provisions of Land Acquisition Act - Contention by appellant that court below had no power to remand matter to arbitrator. (Para 1, 2)**

**Question before High Court was to examined whether court below was justified in remanding matter to arbitrator - In P. Nagaraju alias Cheluvaiah (infra), question regarding power of remand in proceedings u/s 34 of Arbitration and Conciliation Act arose for consideration. (Para 6)**

**The judgement of Supreme Court in Kinnari Mullick (infra) relied upon by appellant was not applicable to instant case and it arose out of private contract between parties - Dealing with distinction between private contracts and statutory contracts under National Highways Act, Supreme Court held in P. Nagaraju alias Cheluvaiah (infra) there exists statutory arbitrator as in instant case - Private contracts between parties which contemplate appointment of arbitrator and cases where statutory arbitrators are appointed under statute fall in two separate classes. (Para 8)**

**Appeal dismissed.** (E-13)

**List of Cases cited:**

1. Kinnari Mullick & anr. Vs Ghanshyam Das Damani reported at (2018) 11 SCC 328

2. National Highways Authority of India Vs P. Nagaraju @ Cheluvaiah & anr. reported at (2022) 15 SCC, (Para 42, 45, 47)

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

1. The instant arbitration appeal arises out of an order dated 18.05.2024 passed by the Additional District Judge, POCSO Act, Bijnor in Misc. Arbitration Case No.218 of 2022 (Dwarikesh Sugar Industries Limited v. National Highway Authority of India and another) in proceedings under Section 34 of the Arbitration and Conciliation Act, 1996. By the impugned order dated 18.05.2024, the learned court below has remanded the matter to the arbitrator for fresh consideration in light of the observations made in the body of the judgement. The learned court below has found that the amount of compensation was not computed in light of the provisions of the Land Acquisition Act.

2. Shri Pranjal Mehrotra, learned counsel for the appellant contends that the learned court below had no power to remand the matter to the arbitrator. In this regard, reliance is placed on the judgement rendered by the Hon'ble Supreme Court in **Kinnari Mullick and another v.**

**Ghanshyam Das Damani** reported at **(2018) 11 SCC 328.**

3. Per contra, Shri Naveen Sinha, learned Senior Counsel assisted by Shri Tarun Agrawal, learned counsel for the respondent No.1 submits that the prerequisites of remand are satisfied in the facts of this case. The learned court below had the jurisdiction to remand the matter to the arbitrator. In this regard, reliance is placed on the judgement rendered by the Hon'ble Supreme Court in **National Highways Authority of India v. P. Nagaraju alias Cheluvaiah and another**, reported at **(2022) 15 SCC**.

4. Heard Shri Pranjal Mehrotra, learned counsel for the appellant and Shri Naveen Sinha, learned Senior Counsel assisted by Shri Tarun Agrawal, learned counsel for the respondent No.1.

5. While remanding the matter, the learned court below has opined that the arbitrator had erred in law by computing the compensation in the teeth of Section 26 of the Right to Fair Compensation and Transparency in Land Acquisition in Land Acquisition, Rehabilitation and Resettlement Act, 2013.

6. It needs to be examined whether the learned court below was justified in remanding the matter to the arbitrator. In **P. Nagaraju alias Cheluvaiah (supra)** the question as regards the power of remand in proceedings under Section 34 of the Arbitration and Conciliation Act arose for consideration. Dealing with the distinction between the private contracts and the statutory contracts under the National Highways Act, the Supreme Court held as under:

"42. Having taken note of the said decision, though it is seen that it was held so while considering the maintainability of petition under Section 11 of the Act, 1996 to exclude the right of the land loser to seek the appointment of an Arbitrator keeping in view the statutory provision in the NH Act, the larger perspective of such limited right to the land loser in the process of arbitration is also to be kept in view. Unlike the arbitration in a contractual matter where the parties from the very inception at the stage of entering into a contract would mutually agree to refer any future dispute to an arbitrator, at that very stage are aware that in the event of any dispute arising between the parties the contours of the right, remedy, and scope from the commencement of the arbitration up to the conclusion through the judicial process. The terms of arbitration and the rights and obligations will also be a part of the agreement and a reference to the same in the award will constitute sufficient reasons for sustaining the award in terms of Section 31(3) of Act, 1996. Whereas, in the arbitration proceedings relating to NH Act, the parties are not governed by an agreement to regulate the process of arbitration. However, in the process of determination of just and fair compensation, the provisions in Section 26 to 28 of RFCTLARR Act, 2013 will be the guiding factor. The requirement therein being adverted to, should be demonstrated in the award to satisfy that Section 28(2) and 31(3) of Act, 1996 is complied."

45. Therefore, while examining the award within the parameters permissible under Section 34 of Act, 1996 and while examining the determination of compensation as provided under Sections 26 and 28 of the RFCTLARR Act, 2013, the concept of just compensation for the acquired land should be kept in view while taking note of the award considering the sufficiency of the reasons given in the

award for the ultimate conclusion. In such event an error if found, though it would not be possible for the Court entertaining the petition under Section 34 or for the appellate court under Section 37 of Act 1996 to modify the award and alter the compensation as it was open to the court in the reference proceedings under Section 18 of the old Land Acquisition Act or an appeal under Section 54 of that act, it should certainly be open to the court exercising power under Section 34 of Act, 1996 to set aside the award by indicating reasons and remitting the matter to the Arbitrator to reconsider the same in accordance with law. The said exercise can be undertaken to the limited extent without entering into merits where it is seen that the Arbitrator has on the face of the award not appropriately considered the material on record or has not recorded reasons for placing reliance on materials available on record in the background of requirement under RFCTLARR Act, 2013."

47. Under the scheme of the 1996 Act it would not be permissible to modify the award passed by the learned Arbitrator to enhance or reduce the compensation based on the material available on record in proceeding emanating from Section 34 of Act, 1996. The option would be to set aside the award and remand the matter. In this regard it would be apposite to take note of the observation in M. Hakeem (supra), as hereunder:-

"42. It can therefore be said that this question has now been settled finally by at least 3 decisions of this Court. Even otherwise, to state that the judicial trend appears to favour an interpretation that would read into Section 34 a power to modify, revise or vary the award would be to ignore the previous law contained in the 1940 Act; as also to ignore the fact that the 1996 Act was enacted based on the UNCITRAL Model Law on International Commercial Arbitration, 1985 which, as has been pointed out in Redfern and Hunter on International Arbitration, makes it clear that, given the limited judicial interference on extremely limited grounds not dealing with the merits of an award, the "limited remedy" under Section 34 is coterminous with the "limited right", namely, either to set aside an award or remand the matter under the circumstances mentioned in Section 34 of the Arbitration Act, 1996."

7. After laying down the aforesaid proposition of law, the arbitration proceedings were remanded to the arbitrator with the following directions:

"84.2. The arbitration proceedings bearing Case Nos.:

LAQ(A)/NH-275/CR/137/2017-18,

LAQ(A)/NH-275/CR/134/2017-18,

LAQ(A)/NH-275/CR/135/2017-18,

LAQ(A)/NH-275/CR/132/2017-18,

LAQ(A)/NH-275/CR/139/2017-18,

LAQ(A)/NH-275/CR/41/2019-20

are remanded to the Deputy Commissioner and Arbitrator, NH-275, Ramanagar District, Ramanagar and Case No.LAQ/ARB/BNG/NH-275/CR-02/ 2/ 2018-19 is remanded to Deputy Commissioner and Arbitrator, Bangalore Rural District."

8. The judgement of the Supreme Court in **Kinnari Mullick (supra)** relied upon by the appeal is not applicable to this case. **Kinnari Mullick (supra)** arose out of a private contract between the parties. In the instant case as in **P. Nagaraju alias**

**Cheluvaiah (supra)** there exists a statutory arbitrator. Private contracts between parties which contemplate the appointment of an arbitrator and the cases where the statutory arbitrators are appointed under the statute fall in two separate classes.

9. Thus the judgement rendered in **Kinnari Mullick (supra)** being distinguishable is of no avail to the appellant. Further, the said judgement had been considered by the Hon'ble Supreme Court in **P. Nagaraju alias Cheluvaiah (supra)** while rendering its judgement in the aforesaid case.

10. The arbitration appeal is dismissed.

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**(2024) 11 ILRA 7**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 06.11.2024**

**BEFORE**

**THE HON'BLE MANISH MATHUR, J.**

Writ A No. 5232 of 2024
with other connected cases

**Pushkar Singh Chandel & Ors.**
**...Petitioners**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioners:**
Amit Mishra, Dileep Kumar Mishra

**Counsel for the Respondents:**
C.S.C., Abhinav Singh, Pradeep Tiwari, Prashant Kumar Singh, Ran Vijay Singh, Ravi Prakash Yadav, Rishabh Tripathi

**A. Civil Law - Transfer of teachers employed in Basic Schools - Constitution of India, Article 14 - Intelligible differentia - Transfer/adjustment of teachers to maintain Pupil-Teacher Ratio – Right of Children to Free and Compulsory Education Act, 2009, Sections 19 and 25 – U.P. Basic Education Act, 1972 – U.P. Basic Education (Teachers) Service Rules, 1981, Rule 21 – Legality of Clauses 3, 7, 8, & 9 of Government Order dated 26.06.2024 and Circular dated 28.06.2024 – Proceedings initiated for fulfilment of the pupil-teacher ratio. Clause 7 of the Government Order provides that shifting of teachers would be affected by transferring teachers under the principle of "last come, first go", whereby the junior-most teacher would be shifted out first. *Held :* Impugned Government Order does not indicate any reasoning as to why the principle of "last in, first out" is required to be followed for transfer/adjustment of teachers."Last in, first out" does not have any rational nexus with the object sought to be achieved by the Act of 2009. There is no provision in the Act of 2009 or rules framed thereunder for transfer/adjustment to be made in keeping with the norms prescribed under Schedule by transferring the junior-most teacher of a school/district. If the procedure prescribed under the impugned clauses is kept intact, the real purpose or effect of such a condition would entail frequent transfer of junior teachers while keeping intact the posting of senior teachers for all times to come, since a teacher after transfer and joining in another district would *ipso facto* remain a junior. By introducing such a concept, a classification has been made pertaining to those teachers who have been posted in a particular school longer than others who have been posted there subsequently. For such a classification, no intelligible differentia has been indicated either in the Government Order, the Circular, or even in the counter affidavit filed by the opposite parties – Court held the classification to be discriminatory and failing the test of reasonable classification in the context of Article 14 of the Constitution of India.**

**B. U.P. Basic Education (Teachers) Service Rules, 1981, Rules 5 & 8 - Legality of Clause 3 of Government Order dated 26.06.2024 – Clause 3 of the Government**

**Order stipulates that transfer/adjustment would also take into account the number of *Shiksha Mitra* employed in a particular school. *Held* – Inclusion of *Shiksha Mitra* for determining Pupil-Teacher Ratio under Clause 3 of the Government Order is contrary to statutory provisions. Rule 5 and Rule 8 of the 1981 Service Rules stipulate specific sources of recruitment and qualifications for Assistant Teachers, which cannot be diluted through executive instructions. Qualifications required for appointment as an Assistant Teacher are not required for appointment as a *Shiksha Mitra.* Government Order equating Assistant Teachers with *Shiksha Mitra* treats unequals as equals. Executive orders cannot override statutory rules. Executive orders may supplement but not supplant statutory provisions. (Paras 60, 61, 62, 63)**

**Allowed.** (E-5)

**List of Cases Cited:**

1. Smt. Reena Singh Vs St. of U.P. & ors., *Writ Petition No. 25238 (S/S) of 2018*

2. Govind Kausik & ors. Vs St. of U.P. & ors., *Writ A No. 10686 of 2024, dated 29.07.2024*

3. Neerja & ors. Vs St. of U.P. & ors., *Writ A No. 9970 of 2024, dated 14.08.2024*

4. Jitendra Singh Rajput & anr. Vs St. of U.P. & ors., *Writ A No. 11049 of 2024*

5. Sarita Rani & ors. Vs St. of U.P. & ors., *Writ A No. 19345 of 2018, order dated 12.09.2018*

6. U.P. Gram Panchayat Adhikari Sangh & ors. Vs Daya Ram Saroj & ors., *(2007) 2 SCC 138*

7. Mary Pushpam Vs Televi Curusunary & ors., *Civil Appeal No. 9941 of 2016*

8. Pandit M.S.M. Sharma Vs Dr. Shri Krishan Sinha & ors., *AIR 1960 SC 1186*

9. Charanjit Lal Vs U.O.I., *AIR 1951 SC 41*

10. U.O.I. Vs Elphinstone Spinning and Weaving Co. Ltd., *(2001) 1 SCC 139*

11. St. of Uttaranchal Vs Sandeep Kumar Singh & ors., *(2010) 12 SCC 794*

12. St. of M.P. Vs Narmada Bachao Andolan & anr., *(2011) 7 SCC 639*

13. Kalyan Chandra Sarkar Vs Rajesh Ranjan @ Pappu Yadav & anr., *(2005) 2 SCC 42*

14. Bilkis Yakub Rasool Vs U.O.I., *(2024) 5 SCC 481*

15. Census Commissioner & ors. Vs R. Krishnamurthy, *(2015) 2 SCC 796*

16. Ramesh Chandra Sharma & ors. Vs St. of U.P. & ors., *(2024) 5 SCC 217*

17. Association for Democratic Reforms & anr.(Electoral Bond Scheme) Vs U.O.I. & ors., *(2024) 5 SCC 1*

18. Senior Superintendent of Post Office Vs Izhar Hussain, *(1989) 4 SCC 318*

19. St. of U.P. & ors. Vs Anand Kumar Yadav, *SLP No. 32599 of 2015*

20. Amarendra Kumar Mohapatra Vs St. of Orissa & ors., *(2014) 4 SCC 583*

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

1. Heard Mr. H.G.S. Parihar learned Senior Counsel assisted by Ms. Minakshi Parihar Singh, Mr. Sudeep Seth learned Senior Counsel assisted by Mr. Onkar Singh, Mr. Upendra Nath Misra learned Senior Counsel assisted by Mr. Ramesh Kumar Dwivedi and Mr. Amrendra Nath Tripathi learned counsel assisted by Mr. Mridul Bhatt, Mr. Uirech Pandey and Mr. Sharda Mohan Tiwari learned counsel for petitioners and other learned counsels for petitioners in connected writ petitions, learned State Counsel and Mr. Ranvijay Singh learned counsel for U.P. Basic Education Board, Prayagraj as well as Mr. Anuj Mishra, Mr. Pradeep Tiwari, Mr. Ravi Prakash Yadav, Mr. Rishabh Tripathi and Mr. Prashant Kumar Singh learned counsel for opposite parties.

2. Since a common cause of action has been agitated in all the writ petitions, the same are being disposed of by a common judgment.

3. In writ A No. 5232 of 2024 this Court vide order dated 23.08.2024 had granted liberty to opposite parties to file a composite counter affidavit instead of separate counter affidavits so that the matter may be decided finally. In pursuance thereof, counter affidavit was filed on behalf of State and vide order dated 29.08.2024, statement of learned State Counsel that a composite counter affidavit has been filed only on legal issues and not factual ones, which was adopted for all the connected writ petitions was recorded. Rejoinder affidavit to the same has also been filed.

4. Petitions have been filed challenging Clauses 3,7,8 and 9 of the government order dated 26.06.2024 as well as similar clauses indicated in the circular dated 28.06.2024 issued by the Basic Education Board.

5. The aforesaid government order and circular have been issued purportedly in terms of Right to Education Act 2009 and the rules framed by the State Government in 2011 thereunder whereby proceedings have been initiated for fulfilment of the pupil-teacher ratio in accordance with the schedule prescribed under sections 19 and 25 of the Act of 2009.

6. Clause 3 of the government order, loosely translated prescribes that for the academic Session 2023-24 and as per the student strength as on 31.03.2024, teachers are required to be shifted from such schools where they are surplus as per the bench mark of the pupil-teacher ratio to schools where such bench mark remains unfulfilled. It also indicates that such shifting would be on the basis of length of service of a teacher in a particular district.

7. Clause 7 of the government order provides that such shifting of teachers would be effected by transferring teachers on the basis of their length of service in a particular district as per their date of appointment under the principle of last come first go whereby the junior most teacher would be shifted out first.

8. Clause 8 of the government order indicates by and large the same factor of last come first out principle but also requires the bench mark to be determined by taking into the account the number of Shikshsa Mitra/ Contractual Teachers available in a school.

9. Clause 9 of the government order prescribes that such inter district transfer will be in terms of the U.P. Basic Education Teachers Service Regulations 1981 as well as notifications dated 2010 and 2014 issued by the National Teachers Education Board and also provides such transfers to take place on the basis of last come first out.

10. It is relevant to indicate that all the petitioners are employed in basic schools and are governed by provisions of the U.P. Basic Education Act 1972. Section 13 of the Act of 1972 indicates that the Uttar Pradesh Board of Basic Education constituted under section 3 thereof (hereinafter referred to as Board) would carry out such directions as are issued to it from time to time by State Government for efficient administration of the Act. It primarily prescribes control of the State Government over the board. Section 13(A)

gives an overriding effect of the Act of 1972 over and above the U.P. Panchayat Raj Act, 1947, U.P. Municipalities Act 1916 and the U.P. Municipal Corporation Act 1959.

11. Under Section 19 of the Act of 1972, power has been conferred upon the State Government to make rules for carrying out purposes of the Act.

12. In terms of such power, the State Government framed the U.P.Basic Education (Teachers) Service Rules 1981. Rule 21 of the said rules prescribes a procedure for transfer to the effect that there shall be no transfer of any teacher except on the request of or with the consent of teacher concerned and in either case, approval of the board shall be necessary.

13. Subsequent to implementation of the aforesaid Act and rules framed thereunder, the Central Government exercising its concurrent powers under Schedule VII of the Constitution of India framed the Right of Children to Free and Compulsory Education Act, 2009. Section 18 of the said Act provides that no school is to be established without obtaining certification of registration while section 19 indicates the norms and standards for school and specifically provides that no school shall be established/recognized under section 18 unless it fulfils the norms and standards specified in schedule. In cases where school has been established before commencement of the Act but did not fulfil the norms and standard specified, three years time from the date of commencement of the Act was provided to fulfil such norms and standards, failing which recognition under section 18 could be withdrawn.

14. Section 25 of the Act pertains to maintaining pupil-teacher ratio and states that within three years from the date of commencement of the Act, the appropriate government and the local authority shall ensure that pupil-teacher ratio as specified in the schedule is maintained in each school. Section 26 pertains to filling up of vacancies of teachers with appointing authority duty bound to ensure that vacancy of teachers in school under its control shall not exceed 10% of the sanctioned strength.

15. Section 35 of the Act conferred powers on the Central Government, appropriate government or the local authority to issue guidelines for the purposes of implementation of provisions of the Act.

16. In terms of sections 19 and 25 of the Act, the schedule prescribes norms and standards for a school with item No.1 pertaining to number of teachers required.

17. In terms of power conferred, the Central Government framed Rules of 2010 with the State of U.P. subsequently following by framing U.P. Right of Children to Free and Compulsory Education Rules 2011.

18. Rule 10 of the Rules of 2011 prescribes that the extended period of admission in a school shall be three months from the date of commencement of academic year of school i.e. 30th September after commencement of the session.

19. Rule 21 of the said Rules indicates the procedure for maintaining pupil teacher ratio in each school. The relevant Rule is as follows: -

*"21. Maintaining of Pupil Teacher Ratio in each school (Section 25). - (1) The sanctioned strength of teachers in every school shall be notified by the District Magistrate of the respective district. Such notification shall be displayed on the district website, the sanctioned strength of teachers in a school shall be informed to the respective school and local authority:*

*Provided that the District Magistrate, shall, within two months of such notification, redeploy teachers of schools having strength in excess of the sanctioned strength prior to the notification referred to in sub-rule (1).*

*(2) In order to maintain the specified pupil-teacher ratio, the District Magistrate shall review the sanctioned strength of teacher in every school every year before the month of July and redeploy the teachers as per requirement."*

20. The impugned government order and circular have thereafter been issued by the State Government purportedly in exercise of powers conferred under the aforesaid Acts and Rules for the purposes of maintaining pupil-teacher ratio in the State of U.P.

21. Mr. H.G.S. Parihar learned Senior Counsel has assailed the aforesaid conditions of the government order on the ground that principle of last come first out as indicated to be a mode of transfer of teachers is illegal being contrary to the statutory provisions as well as arbitrary and therefore violative of Articles 14 and 16 of Constitution of India inasmuch as it would entail frequent transfers of junior teachers while maintaining senior teachers in the same school for years together.

22. It is further submitted that aforesaid clauses are contrary to the provisions of the Act of 2009, Rules of 2011 as well as against the Service Rules of 1981 applicable upon petitioners. He has placed reliance on judgment rendered by Co-ordinate Bench of this Court in the case of ***Smt. Reena Singh versus State of U.P. and others, writ petition No. 25238 (S/S) of 2018*** to submit that the present issue was also agitated in the said writ petition which was allowed by means of judgment and order dated 11.12.2018 striking down the provision of last come first out. It is therefore submitted that the impugned conditions are violative of aforesaid judgment. It is further submitted that as per Rule 21 of the Rules of 2011, it is only the District Magistrate who has been granted power to review and notify the sanctioned strength of every school before July but by means of impugned government order and circular, cut off date of 31.03.2024 has been prescribed for determining the pupil-teacher ratio, which therefore is contrary to the said Rule. He further submits that by means of impugned government order and circular, a provision is sought to be brought into existence which is contrary to the mandate of the Act of 2009 and rules framed thereunder. He has therefore challenged the cut off date for determination of pupil-teacher ratio indicated in the impugned government order.

23. Mr. Sudeep Seth, learned Senior Counsel has also raised challenge to the principle of last and first out with the submission that such a mode of transfer is not stipulated under the Act of 2009. He submits that executive instruction can only supplement statutory provisions but cannot supplant them as is being sought to be done in the present case since neither the Act of

2009 nor the Rules framed thereunder prescribe any such mode of transfer. He further submits that the aforesaid principle of last and first out is also contrary to Rule 21 of the Service Rules of 1981. Learned counsel further submits that Rules 15 and 16 of the Rules of 1981 provides for minimum qualification of teacher with relaxation of minimum qualification but does not include a Shiksha Mitra who does not come under the definition of teacher in terms with the National Council for Technical Education notification dated 23.08.2010. He has also submitted that the principle of last in and first out being adopted by the State Government is patently arbitrary since it would entail repeated transfers/adjustment of a Junior Teacher who would thus remain junior for all times to come without any transfer of Senior Teachers. He has also submitted that for such a policy to be valid, the U.P. Basic Education Act of 1972 as well as Service Rules of 1981 would be required to be amended.

24. Mr. Upendra Nath Mishra, learned Senior Counsel while adopting the arguments of his predecessors, further submits that the Pupil-Teacher Ratio is required to be determined as per the schedule to Section 25 of the Act of 2009 as well as the Rules of 2011 and is to be maintained as per each class and not as per Pupil Teacher Ratio of the entire School, which is the criteria being adopted by the opposite parties. He has also submitted that executive instructions cannot supplant statutory provisions. Learned counsel has adverted specifically to schedule under Sections 19 and 25 of the Act of 2009 to submit that the norms and standards for maintaining Pupil Teacher Ratio specifically advert to such ratio to be maintained for each class for the first to fifth class whereafter for each subject. It is submitted that the aforesaid conditions are being violated by opposite parties who have prescribed the procedure without adverting to the aforesaid norm.

25. Learned State counsel on the basis of the two counter affidavits dated 31.07.2024 and 29.08.2024 has refuted submissions advanced by learned counsel for petitioners with the submission that transfer is an incidence of service and once the petitioners having voluntarily chosen their cadre after appointment, are bound by the terms and conditions of service. It is submitted that the impugned Government Order and Circular have been issued to further the beneficial provisions of the Act of 2009 and Rules framed thereunder to ensure that the norms and standards prescribed under the Act are fulfilled. It is submitted that the education of children is of utmost importance for which maintenance of Pupil Teacher Ration in the Basic Schools is an obligation upon State Government due to which the impugned policy has been framed.

26. It is submitted that there is an imbalance regarding teachers working in schools conducted and controlled by the Basic Education Board inasmuch as excess teachers have been appointed in certain Basic Schools viz-a-viz strength of students while other schools have less number of teachers in comparison to the strength of students, which is required to be balanced in view of the statutory provisions.

27. Learned State Counsel further submits that in similar circumstances, the conditions of such transfer/adjustment was challenged in the case of ***Govind Kausik & Ors. versus State of U.P. & Ors., Writ A No.10686 of 2024*** which was disposed of

vide order dated 29.07.2024. It is submitted that subsequently the said order was considered by Division Bench of this Court in the case of ***Neerja & Ors. versus State of U.P. & Ors., Writ A No.9970 of 2024*** which too was disposed of vide order dated 14.08.2024 specifically indicating that at present no occasion exists to test the constitutionality of policy since no firm cause of action is seen to have arisen to the petitioners. It is submitted that the aforesaid judgment in the case of ***Neerja*** (supra) has thereafter been followed by various other Coordinate Benches such as in the case of ***Jitendra Singh Rajput & Another versus State of U.P. & Ors., Writ A No.11049 of 2024.***

28. Learned State counsel has also adverted to another judgment rendered by Coordinate Bench of this Court dated 12.09.2018 passed in the case of ***Sarita Rani & Ors. versus State of U.P. & Ors., Writ A No.19345 of 2018*** to submit that the same policy issued earlier by means of Government Order dated 20.07.2018 was under challenge and the said Writ Petition was thereafter dismissed. It is submitted that the said judgment of learned Single Judge in the case of ***Sarita Rani*** (supra) was thereafter upheld in Special Appeal No.1035 of 2018 vide judgment and order dated 23.10.2018. He has therefore submitted that keeping in view principles of judicial discipline as well as res judicata, the present petition is liable to be rejected. He has placed reliance on judgments rendered by Hon'ble the Supreme Court in the case of **U. P. Gram Panchayat Adhikari Sangh and Ors. versus Daya Ram Saroj & Ors., (2007) 2 SCC 138, Mary Pushpam versus Televi Curusunary & Ors. , Civil Appeal No.9941 of 2016, Pandit M.S.M. Sharma versus Dr. Shri Krishan Sinha and others AIR 1960 SC 1186, Charanjit Lal versus Union of India AIR 38 SCC page 1951, Union of India versus Alphinstone Shipping and Weaving Company Limited voted in 2001 Vol.1.-IV SCC page 139** as well as in the case of **State of Uttranchal versus Sandeep Kumar Singh & Ors., (2010) 12 SCC 794.**

29. Learned State Counsel has also submitted that in case a lis in the realm of policy decision qua public interest has been conclusively decided, the said would be binding between the parties. It has also been submitted that it is settled law that presumption is always in favour of constitutionality of an enactment and burden is upon the person who challenges it to indicate a clear transgression of the constitutional principle. He submits that even if a classification has been resorted to, courts should not hold it to be invalid merely because the benefit might have been extended to other persons for whom the law was made and that it is the legislature which is the best judge of needs of particular classes. It is further submitted that while examining a particular statute, the legislative intent for striking a balance with regard to letter and spirit of the statute is required.

30. Mr. Ran Vijay Singh, learned counsel appearing for the Board has also adopted submissions of learned State Counsel to submit that the power to deploy teachers is inherent in the Board in terms of the Service Rules of 1981 as well as the Act of 2009 and the Rules of 2011. He has also taken the plea of precedent in terms of judgments in the cases of ***Govind Kaushik*** (supra), ***Neerja*** (supra) and ***Sarita Rani*** (supra).

31. Upon consideration of submissions advanced by learned counsel for parties and

perusal of material on record, the question required to be addressed is whether Clauses 3, 7, 8 & 9 of the Government Order dated 26.06.2024 as well as the same Clauses of Circular dated 28.06.2024 are in violation of statutory provisions and Rules framed thereunder or not ?

**Precedent & Resjudicata**

32. At the very out-set, since the aspect of precedent & resjudicata has been raised by learned State Counsel, it would be appropriate to address the said issue prior to addressing any other issue.

33. As indicated herein-above, learned State counsel has adverted to the judgments rendered in similar circumstances in the cases of ***Govind Kaushik*** (supra), ***Neerja*** (supra) and Sarita Rani (supra) with the submission that once the aforesaid issue has already been adjudicated upon by Coordinate as well as Division Bench of this Court, it is not open for petitioners to re-agitate the same and that this Court also would be bound by principles of precedent/resjudicata.

34. In the case of ***Govind Kaushik*** (supra), vide order dated 29.07.2024, the following was observed:

*"5.Today, Shri Abhishek Srivastava, learned CSC has placed on record written instructions dated 29.7.2024 received by him from the Director of Education (Basic). Copy of the same has been marked as 'X' and retained on record 4th paragraph of the said written instruction reads as below:*

"माननीय उच्च न्यायालय की पृच्छा के सम्बन्ध में अवगत कराना है कि उ०प्र०, निःशुल्क एंव अनिवार्य बाल शिक्षा का अधिकार नियमावली 2011 के नियम-10 में निहित प्राविधान के दृष्टिगत शैक्षिक सत्र 2024-25, दिनांक 01 अप्रैल 2024 से प्रारम्भ होने के कारण दिनांक 30 जून, 2024 को यू-डायस पर उपलब्ध छात्र- संख्या को आधार मानते हुए छात्र शिक्षक अनुपात आगणित कर शासनादेश में दी गयी व्यस्थानुसार विद्यालयवार अधिसंख्य शिक्षक एंव शिक्षका चिन्हित करते हुए अन्तः जनपदीय स्थानान्तरण/समायोजन की प्रक्रिया की जायेगी तथा दिनांक-30.06.2024 के आधार पर छात्र-शिक्षक अनुपात में निःशुल्क एंव अनिवार्य बाल शिक्षा का अधिकार अधिनियम में प्राविधानानुसार विचलन की स्थिति में नियमानुसार कार्यवाही की जायेगी।"

*6. In view of the stand taken by the State, it has to be recognised that the policy impugned in the writ petition has been partially modified so as to rely on the student-teacher ratio as on 30.06.2024 i.e. Academic Session 2024-25. Thereby the principal grievance of the petitioner has also been addressed.*

*7. As to the action taken/to be taken under the impugned policy, on query made, learned counsel for the respondent states that it would take at least six weeks to prepare ready list of teachers who may be considered for intra- district academic. However, Ms. Archana Singh, learned counsel appearing for the Board of Basic Education would further submit that at the stage of it becoming necessary, the eligible teachers would be given a choice of schools where they may be adjusted.*

*8. Seen in that light, in the first place, the principal grievance of the petitioner has been addressed by the State-respondents. Also, for any other grievance that may arise, we leave it open to the petitioners to approach the Court again, if cause of action arises.*

*9. With the aforesaid observations/directions, the writ petition stands disposed of."*

35. In the case of ***Neerja & Ors.*** (supra), same Impugned Government Order

dated 26.06.2024 and the Circular dated 28.06.2024 were under challenge.

36. The Division Bench after noticing order passed in the case of ***Govind Kaushik*** (supra) entertained the said petition initially primarily on the ground that the time line indicated for determination of posts and identification of teachers who may be surplus is very short and may be conducted in a hurried manner. The Secretaries of the department concerned were thereafter required to file their personal affidavits to explain the exact manner in which determination of surplus post of teachers, identification of surplus teachers and adjustments at different schools was proposed to be made in order to assure the Court that the whole exercise was being done in a transparent manner. The relevant portion of order dated 02.08.2024 is as follows:-

*"4. Prima facie, it does appear that entire exercise may be conducted in a hurried manner. Before we may pass any further order, Shri Arimardan Singh Rajpoot, learned Additional Chief Standing Counsel and Ms. Archana Singh, learned Counsel for the Board pray for time to obtain written instructions.*

*5. In view of the facts noted above, written instructions alone may not be sufficient. Let personal affidavits of the Secretary, Basic Education Board, U.P., Prayagraj and the Additional Chief Secretary, U.P. Basic Education to ensure the exact manner in which the determination of surplus post of teachers, identification of surplus teachers and adjustment at different schools is proposed to be made as may assure the Court that the whole exercise is being done in a transparent manner.*

*6. Put up as fresh on 08.08.2024.*

*7. It has further been assured that no transfer order may be passed till the next date of listing. "*

37. In pursuance of the aforesaid directions, personal affidavits of the Secretaries concerned were filed whereafter on 08.08.2024 the following order had been passed :

*"1. Heard Shri Navin Kumar Sharma, learned counsel for the petitioners, Shri Abhishek Srivastava, learned Chief Standing Counsel along with Dr. D.K. Tiwari, learned Additional Chief Standing Counsel for the State and Ms. Archana Singh, learned Counsel for the Board.*

*2. In compliance of the last order, personal affidavit of Principal Secretary, Basic Education, Government of U.P., Lucknow and Secretary, Basic Education Board, U.P., Prayagraj have been filed today. They are taken on record.*

*3. The timelines indicated in paragraph-9 of the affidavit filed by the Principal Secretary, Basic Education, Government of U.P., Lucknow and paragraph-7 of the Secretary, Basic Education Board, U.P., Prayagraj do appear to address the concern expressed in the last order.*

*4. Learned counsel for the petitioner prays for time.*

*5. Put up as fresh on 14.08.2024.*

*6. In the meantime, the process indicated in paragraph-9 of the affidavit of Principal Secretary, Basic Education, Government of U.P., Lucknow and paragraph-7 of the Secretary, Basic Education Board, U.P., Prayagraj may go on.*

*7. Restrain placed on the transfers is thus vacated. "*

38. The petition was thereafter disposed of vide order dated 14.08.2024 in the following term:

*"7. The position noted in the above two orders has not changed in the meantime. The respondents are proceeding as per the schedule noted above. All grievance being voiced by the petitioners are to be addressed accordingly.*

*8. At present, no occasion exists to test the constitutionality of the policy inasmuch as firm cause of action is not seen to have arisen to the petitioners. At present, it is only an apprehension being voiced. Concrete legal action may arise only if the rights of the petitioners are altered as a result of all the process of declaration of surplus teachers and their reallocation being completed as has been disclosed to the Court and as has been noted above.*

*9. Thus, leaving it open to the petitioners to approach this Court again, if cause of action survives or arises, at present writ petition stands disposed of. "*

39. It is thus evident that neither in the case of ***Govind Kaushik*** (supra) nor in the case of **Neeraj** (Supra), the aspect which has been raised by learned counsel for petitioners in the present writ petition, were considered or adjudicated upon. In both cases, the only aspect considered was the cut off date of 30.06.2024 prescribed for determination of Pupil Teacher Ratio. The aspects of other conditions in clauses 3, 7, 8 & 9 have not been adverted to at all.

40. It is also relevant to indicate that at the time of passing of the aforesaid orders, no list of surplus teachers had been issued whereas in the present scenario, it has been submitted by learned counsel for petitioners and admitted by learned counsel for the Board that a list of surplus teachers District wise has been prepared.

41. With regard to reliance placed by learned State Counsel on the case of ***Sarita Rani*** (supra), it is evident that the said petition was filed challenging only the transfer order dated 18.08.2018. The impugned Government Order and the Circular were not under challenge.

42. The judgments cited by learned State Counsel with regard to judicial discipline are clearly required to be followed. However, the aspect of precedent has also been explained by the Hon'ble Supreme Court in the case of ***State of Madhya Pradesh versus Narmada Bachao Andolan and Another, (2011) 7 SCC 639*** in the following terms:-

*"64. The court should not place reliance upon a judgment without discussing how the factual situation fits in with a fact situation of the decision on which reliance is placed, as it has to be ascertained by analysing all the material facts and the issues involved in the case and argued on both sides. A judgment may not be followed in a given case if it has some distinguishing features. A little difference in facts or additional facts may make a lot of difference to the precedential value of a decision. A judgment of the court is not to be read as a statute, as it is to be remembered that judicial utterances have been made in setting of the facts of a particular case. One additional or different fact may make a world of difference between the conclusions in two cases. Disposal of cases by blindly placing reliance upon a decision is not proper. (Vide MCD v. Gurnam Kaur*

*(1989) 1 SCC 101, Govt. of Karnataka v. Gowramma (2007) 13 SCC 482 and State of Haryana v. Dharam Singh (2009) 4 SCC 340.)"*

43. Even in the case of ***Daya Ram Saroj*** (supra) cited by learned State Counsel, reliance has been placed on another three judge Bench of the Hon'ble Supreme Court in the case of ***Kalyan Chandra Sarkar versus Rajesh Ranjan alias Pappu Yadav and another, (2005) 2 SCC 42***, wherein it was held that the **findings** of a higher Court or a coordinate Bench must precede a serious consideration.

44. Upon consideration of aforesaid judgments, it is thus apparent that a judgment of a Larger Bench is binding on other Benches for the ratio decidendi and law enunciated as has been held in the case of ***Bilkis Yakub Rasool versus Union of India, (2024) 5 SCC 481*** in the following manner:-

*"153. Thus, although it is the ratio decidendi which is a precedent and not the final order in the judgment, however, there are certain exceptions to the rule of precedents which are expressed by the doctrines of per incuriam and sub silentio. Incuria legally means carelessness and per incuriam may be equated with per ignoratium. If a judgment is rendered in ignoratium of a statute or a binding authority, it becomes a decision per incuriam. Thus, a decision rendered by ignorance of a previous binding decision of its own or of a court of coordinate or higher jurisdiction or in ignorance of the terms of a statute or of a rule having the force of law is per incuriam. Such a per incuriam decision would not have a precedential value. If a decision has been rendered per incuriam, it cannot be said that it lays down good law, even if it has not been expressly overruled vide Mukesh K. Tripathi v. LIC (2004) 8 SCC 387, para 23. Thus, a decision per incuriam is not binding.*

*154. Another exception to the rule of precedents is the rule of sub silentio. A decision is passed sub silentio when the particular point of law in a decision is not perceived by the court or not present to its mind or is not consciously determined by the court and it does not form part of the ratio decidendi it is not binding vide Arnit Das (1) v. State of Bihar (2000) 5 SCC 488."*

45. Upon applicability of aforesaid judgments in the present facts and circumstances of the case, it is thus evident that the judgments cited by learned State Counsel are clearly inapplicable as a precedent since the issues raised in this petition were never considered or adjudicated upon and would thus not bind this Court on the principles of either precedent or *res judicata.*

46. The objection so raised by learned State Counsel on the aforesaid ground therefore stands rejected.

**Question Answered:-**

47. With regard to aforesaid question, the grounds raised in challenge thereto pertain primarily to the aspect of last in first out as well as inclusion of Shiksha Mitra for purposes of determining Pupil-Teacher Ratio.

**(a) Last in first out.**

48. A perusal of the aforesaid condition indicated in the impugned

Clauses of the Government Order does not indicate any reasoning as to why the aforesaid principle is required to be followed for transfer/adjustment of teachers in order to adhere to the Pupil-Teacher Ratio in accordance with Schedule to Sections 19 and 25 of the Act of 2009. It is quite evident that by introducing such a concept, a classification has been made by the opposite parties pertaining to those teachers who have been posted in a particular School longer than others who have been posted there subsequently. In order to address challenge to said policy, it would also be apposite to refer to judgment rendered by the Hon'ble Supreme Court in the case of ***Census Commissioner and Others versus R. Krishnamurthy, (2015) 2 SCC 796*** in which the aspect of judicial review of public policy has been explained in the following manner:-

*"31. In M.P. Oil Extraction v. State of M. P.(1997)7 SCC 592, a two-Judge Bench opined that: (SCC p. 611, para 41)*

*"41.... The executive authority of the State must be held to be within its competence to frame a policy for the administration of the State. Unless the policy framed is absolutely capricious and, not being informed by any reason whatsoever, can be clearly held to be arbitrary and founded on mere ipse dixit of the executive functionaries thereby offending Article 14 of the Constitution or such policy offends other constitutional provisions or comes into conflict with any statutory provision, the court cannot and should not outstep its limit and tinker with the policy decision of the executive functionary of the State."*

*32. In State of M.P. v. Narmada Bachao Andolan, (2011) 7 SCC 639 after referring to the State of Punjab v. Ram Lubhaya Bagga (1998) 4 SCC 117, the Court ruled thus: (SCC pp. 670-71, para 36)*

*"36. The Court cannot strike down a policy decision taken by the Government merely because it feels that another decision would have been fairer or more scientific or logical or wiser. The wisdom and advisability of the policies are ordinarily not amenable to judicial review unless the policies are contrary to statutory or constitutional provisions or arbitrary or irrational or an abuse of power. (See Ram Singh Vijay Pal Singh v. State of U.P.,(2007) 6 SCC 44, Villianur lyarkkai Padukappu Maiyam v. Union of India (2009) 7 SCC 561 and State of Kerala v. Peoples Union for Civil Liberties (2009) 8 SCC 46.)"*

*33. From the aforesaid pronouncement of law, it is clear as noon day that it is not within the domain of the courts to embark upon an enquiry as to whether a particular public policy is wise and acceptable or whether a better policy could be evolved. The court can only interfere if the policy framed is absolutely capricious or not informed by reasons or totally arbitrary and founded ipse dixit offending the basic requirement of Article 14 of the Constitution. In certain matters, as often said, there can be opinions and opinions but the court is not expected to sit as an appellate authority on an opinion."*

49. Thus judicial review of policy decisions can be interfered with only in case the policy framed is absolutely capricious, not informed by reasons or totally arbitrary offending basic requirement of Article 14 of the Constitution of India.

50. In the present case, it is apparent that a classification as indicated

hereinabove has resulted due to applicability of the principle of last in first out as per the impugned Government Order and Circular. As already noticed, no reasoning whatsoever has been indicated either in the Government Order or in the Circular for such a classification to be effected. The aspect of reasonable classification has been enunciated and explained by Supreme Court in the case of ***Ramesh Chandra Sharma and Others versus State of U.P. and Others, (2024) 5 SCC 217*** and it was held that for any classification to survive the test of Article 14, it should be based on intelligible differentia having a rational nexus to the object sought to be achieved by law.

51. The said concept was also explained in detail in the case of ***Association for Democratic Reforms and Another (Electoral Bond Scheme) versus Union of India and Others, (2024) 5 SCC 1*** and it was held that Article 14 is an injunction to both the legislative as well as the executive organs of the State to ensure equality before law and equal protection of the laws. It was also reiterated that the aspect of any classification not to be discriminatory should require satisfaction of the condition that it is based on some intelligible differentia and must have a rational relation to the object sought to be achieved by the legislation. Relevant portion of the judgment is as follows:-

*"187. At the outset, the relevant question that this Court has to answer is whether a legislative enactment can be challenged on the sole ground of manifest arbitrariness. Article 14 of the Constitution provides that the State shall not deny to any person equality before the law or the equal protection of laws within the territory of India. Article 14 is an injunction to both the legislative as well the executive organs of the State to secure to all persons within the territory of India equality before law and equal protection of the laws Basheshar Nath v. CIT, 1958 SCC Online SC 7. Traditionally, Article 14 was understood to only guarantee non-discrimination. In this context, courts held that Article 14 does not forbid all classifications but only that which is discriminatory. In State of W.B. v. Anwar Ali Sarkar,(1952) 1 SCC 1, S.R. Das, J. (as the learned Chief Justice then was) laid down the following two conditions which a legislation must satisfy to get over the inhibition of Article 14: first, the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others; and second, the differentia must have a rational relation to the object sought to be achieved by the legislation. In the ensuing years, this Court followed this "traditional approach" to test the constitutionality of a legislation on the touchstone of Article 14. Kathi Raning Rawat v. State of Saurashtra, (1952)."*

52. The aspect was thereafter discussed in detail and it was held that subordinate legislation could be challenged and tested not only vis-a-vis its conformity with the parent statute but also on the aspect of manifest arbitrariness. The concept of manifest arbitrariness was also explained that it would be applicable in cases where a provision lacked adequate determining principle, if the purpose was not in consonance with constitutional values. It was held that for applying this standard, a distinction between ostensible purpose and real purpose was required to be ascertained and a provision would be manifestly arbitrary in case it was not in

accordance with the said principles. The relevant portions of judgment are as follows:-

*"200.1. A provision lacks an "adequate determining principle" if the purpose is not in consonance with constitutional values. In applying this standard, Courts must make a distinction between the "ostensible purpose", that is, the purpose which is claimed by the State and the "real purpose", the purpose identified by courts based on the available material such as a reading of the provision Chandrachud and Nariman, JJ. in Joseph Shine, (2019) 3 SCC 39 and..... "*

*204. The above discussion shows that manifest arbitrariness of a subordinate legislation has to be primarily tested vis-à-vis its conformity with the parent statute. Therefore, in situations where a subordinate legislation is challenged on the ground of manifest arbitrariness, this Court will proceed to determine whether the delegate has failed "to take into account very vital facts which either expressly or by necessary implication are required to be taken into consideration by the statute or, say, the Constitution. "Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India, (1985) 1 SCC 641. In contrast, application of manifest arbitrariness to a plenary legislation passed by a competent legislation requires the Court to adopt a different standard because it carries greater immunity than a subordinate legislation. We concur with Shayara Bano v. Union of India, (2017) 9 SCC 1 that a legislative action can also be tested for being manifestly arbitrary. However, we wish to clarify that there is, and ought to be, a distinction between plenary legislation and subordinate legislation when they are challenged for being manifestly arbitrary."*

53. Upon applicability of aforesaid judgment in the present facts and circumstances of the case, it is thus required to be seen as to whether the classification so made would survive the test of Article 14 or not.

54. As would be evident from the counter affidavit filed by opposite parties as well as submissions made by learned State Counsel, the impugned clauses are sought to be protected on the premise that they have been issued to further the scope and object of the Act of 2009 and the rules framed thereunder.

55. However, a perusal of Sections 19 and 25 indicates only the aspect of maintaining Pupil-Teacher Ratio as per the Schedule. The ostensible purpose of such norms and standards to be maintained is clearly that no School or Class is deprived of a teacher in accordance with pupil strength.

56. It is also discernible that there is no provision incorporated in the Act of 2009 or rules framed thereunder for transfer/ adjustment to be made in keeping with the norms prescribed under Schedule by transferring the junior most teacher of a School/ District.

57. If the aforesaid procedure prescribed under the impugned clauses is kept intact, the real purpose or effect of such a condition would entail frequent transfer of junior teachers in accordance with Rule 21 of the Rules of 2011 while keeping intact the posting of senior teachers for all times to come since a teacher after transfer and joining in another district, would ipso facto remain a junior.

58. This condition therefore, is clearly not in accordance with real intention and purpose of the Act of 2009 and the rules framed thereunder. Such a classification also does not adhere to the test that it should be based on any intelligible differentia since no such intelligible differentia has been indicated either in the Government Order, the Circular or even in the counter affidavit filed by the opposite parties. Furthermore, the procedure as indicated for last in first out also does not appear to have any rational nexus with the object sought to be achieved by the Act of 2009 and the rules framed thereunder.

59. In view of such discussion, this Court finds the classification so made to be discriminatory and failing the test of reasonable classification in the context of Article 14 of the Constitution of India.

**(b) Inclusion of Shiksha Mitra in parity with Assistant Teachers under Clause 3 of the Government Order.**

60. Another aspect which is required to be taken into consideration is that executive orders can only supplement statutory provisions, the purpose of which it purports to further but it can neither supplant nor override such provisions as has already been held by the Hon'ble Supreme Court in the case of ***Senior Superintendent of Post Office versus Izhar Hussain, (1989) 4 SCC 318.***

61. It is also relevant to notice that impugned Clause 3 of the Government Order stipulates that such transfer/ adjustment would also take into effect by considering the number of Shiksha Mitra employed in a particular School.

62. The inclusion of Shiksha Mitra as a condition for determination of Pupil-Teacher Ratio, is quite against the statutory conditions of service indicated in the Service Rules of 1981 under which Rule 5 pertains to sources of recruitment and indicates that Assistant Masters and Assistant Mistresses in Junior Basic Schools are to be recruited by direct recruitment as stipulated in Rule 14 and in other cases by promotion through Rule 18. Rule 8 indicates academic qualifications for such Assistant Masters and Mistresses and stipulates a Bachelor Degree from a University established by law in India or a Degree recognized by the Government equivalent thereto with any other training course recognized by the Government as equivalent thereto. Other certificates such as the Basic Teacher Certificate and Degree in Elementary Education etc. are also prescribed alongwith Basic Teacher Certificate, whereas by means of U.P. Basic Education (Teachers) Service (22nd Amendment) Rules 2018, whereby Rule 8 was amended defines a 'Shiksha Mitra' to mean a person working as such in Junior Basic Schools run by the Basic Shiksha Parishad under Government Orders prior to commencement of the U.P. Right of Children to Free and Compulsory Education Rules, 2011 or a person, who has been a Shiksha Mitra and appointed as an Assistant Teacher in terms of judgment rendered by the Hon'ble Supreme Court in the case of ***State of U.P. and Others versus Anand Kumar Yadav, SLP No.32599 of 2015.***

63. The aforesaid aspect makes it evident that the qualifications required for purposes of appointment as an Assistant Teacher are not required for appointment as a Shiksha Mitra and, therefore, the Government Order clearly erred in equating Assistant Teachers with Shiksha Mitra. Evidently unequals have been treated as equals.

**Consideration of judgment in the case of Smt. Reena Singh (supra)**

64. Learned counsel for petitioners have also adverted to judgment rendered by coordinate Bench of this Court in the case of ***Smt. Reena Singh*** (supra) to submit that the impugned clauses of Government Order and Circular are against the dictum indicated therein. A perusal of aforesaid judgment clarifies the aspect that conditions 2 (2) (1) and 2 (3) (4) of the Government Order dated 20.07.2018 and the Circular dated 16.08.2018 pertaining to list of surplus teachers prepared was under challenge primarily on the ground of arbitrariness and challenge to the concept of last in first out as well as the change in academic session as apparent from Paragraphs 11(V), 24, 26 and 27 of the judgment, which are as follows:

*"11(V)They next submitted that under Right to Free and Compulsory Education Act, 2009 and under the Rules of 1981, it has not been provided that the transfer / adjustment shall be made on the basis of "last in first out", as has been provided under the Government Order dated 20.07.2018. They further submitted that neither under Rule 21 of U.P. Basic Education (Teachers) Service Rules, 1981 nor in the Act No.35 of 2009 there is provision for making transfer by adopting a policy of "last in first out", therefore, the action of the respondents is arbitrary in nature.*

*"(24) Under Clause 2(3) of the Government Order dated 20.07.2018, it has been provided that how the adjustment of the teachers shall be made and while prescribing the procedure, no provision has been made with respect to the candidates, who are being transferred from other districts and also in respect of the new admission. The criteria would have been to first accommodate those teachers, who have been transferred from other districts in those schools, in which the pupil-teacher ratio is less than the prescribed limit and then to post the fresh appointees on those posts and thereafter, the teachers already working should have been redeployed and adjusted on the remaining posts.*

*(26) In view of the overall consideration of the relevant rules on the subject and the government order and circular under challenge, this Court records that the law is settled that executive instruction can only supplement the statutory law and cannot supplant the law. In the case in hand, the Government Order dated 20.07.2018 is in violation to the statutory provisions and has over ridden the rules, which have been framed by the rule making authorities in exercise of power conferred upon it by the Act of 2009.*

*(27) On perusal of the Government Order dated 20.07.2018 and circular dated 16.08.2018, it has been provided that transfer / adjustment shall be made on the basis of "last in first out". The transfers are made in exigencies of service in public interest or on administrative grounds. To meet out the public interest in imparting education to the students admitted in the academic session in consonance with the provisions contained under Right of Children to Free and Compulsory Education Act, 2009 and rules framed thereunder, the pupil-teacher ratio and deadline in this regard has been fixed from the date of start of session. There is clear cut violation of the act and rules, wherein specific provision was provided in regard to maintenance of the pupil-teacher ratio. The authority has also been defined under the act and rules to determine the pupil-teacher ratio. While issuing the government order and circulars, all these provisions have been ignored by the State Government. Therefore, the policy of the*

*State Government is faulty and shall not fulfill the scope to provide free and compulsory education to the children and is contrary to the Right of Children to Free and Compulsory Education Act, 2009 and Right of Children to Free and Compulsory Education Rules, 2010. "*

65. The aforesaid paragraphs of the judgment make it evident that the concept of last in first out, which was a procedure adopted earlier also by the State in the Government Order dated 20.07.2018 and the Circular dated 16.08.2018 was held to be arbitrary. Despite the fact that said judgment has attained finality since it was not challenged, the opposite parties have reiterated the aforesaid condition in the impugned Government Order and Circular, which is clearly contrary to the aforesaid judgment.

66. The preceding discussion is self evident with regard to the fact that the aspect of last in and first out has already been held to be invalid by Co-ordinate Bench decision of this Court in the case of **Reena Singh** (supra). In such circumstances the impugned government orders which have been passed without noticing or adverting to the judgment of Reena Singh (supra) can at best be considered to come within the realm of a validation provision.

67. It is well settled that once judicial pronouncements have been made with regard to validity or otherwise of statute, subordinate legislation or even administrative or executive orders, the same are required to be followed unless validation laws are subsequently passed since the power to validate a law declared invalid is within the exclusive province of legislature. However such subsequent enactments or executive orders would have to answer the scrutiny that the vice that rendered it invalid by a judicial pronouncement has been cured and is now consistent with the rights guaranteed by part III of the Constitution. It is only when answer to such scrutiny is in the affirmative that the validation provision can be held to be effective.

68. The aforesaid aspect has been enunciated by Hon'ble Supreme Court in the case of **Amarendra Kumar Mohapatra versus state of Orissa and others** (2014) 4 SCC 583 in the following manner:-

*" 25. Judicial pronouncements regarding validation laws generally deal with situations in which an Act, Rule, action or proceedings has been found by a court of competent jurisdiction to be invalid and the legislature has stepped in to validate the same. Decisions of this Court which are a legion take the view that while adjudication of rights is essentially a judicial function, the power to validate an invalid law or to legalise an illegal action is within the exclusive province of the legislature. Exercise of that power by the legislature is not, therefore, an encroachment on the judicial power of the Court. But, when the validity of any such Validation Act is called in question, the Court would have to carefully examine the law and determine whether (i) the vice of invalidity that rendered the Act, Rule, proceedings or action invalid has been cured by the validating legislation, (ii) whether the legislature was competent to validate the Act, action, proceedings or Rule declared invalid in the previous judgments, and (iii) whether such validation is consistent with the rights guaranteed by Part III of the Constitution.*

*It is only when the answer to all these three questions is in the affirmative that the Validation Act can be held to be effective and the consequences flowing from the adverse pronouncement of the Court held to have been neutralised. Decisions of this Court in Shri Prithvi Cotton Mills Ltd. v. Broach Borough Municipality [(1969) 2 SCC 283] , Hari Singh v. Military Estate Officer [(1972) 2 SCC 239] , Madan Mohan Pathak v. Union of India [(1978) 2 SCC 50 : 1978 SCC (L&S) 103] , Indian Aluminium Co. v. State of Kerala [(1996) 7 SCC 637] , Meerut Development Authority v. Satbir Singh [(1996) 11 SCC 462] and ITW Signode India Ltd. v. CCE [(2004) 3 SCC 48] fall in that category."*

69. Another aspect which is worth noticing is that in Clause 7 of the Government Order, a further prescription has been made for determination of junior most teacher. It stipulates that seniority would be determined on the basis of length of service in a particular district and where it is same, would be determined on the basis of date of birth.

70. The same appears to be in stark contrast to determination of seniority of teachers under Rule 22 of the Service Rules of 1981, whereby seniority is required to be determined according to the order in which the names appear in the select list prepared in terms of Rule 17 or 17 (A) or 18 as the case may be.

71. So far as the aspect of cut off date challenged in the aforesaid government order and circular is concerned, this Court is not adverting to the same since this aspect has already been considered in the Division Bench Judgment of **Neerja** (supra).

72. In view of aforesaid discussion, it is evident that the impugned Clauses of the Government Order dated 26.06.2024 and the Circular dated 28.06.2024 are manifestly arbitrary and, therefore, the Clauses 3, 7, 8 and 9 of the aforesaid Government Order and Circular are hereby quashed by issuance of writ in the nature of certiorari. Accordingly, above writ petitions succeed and are **allowed**. Parties to bear their own costs.

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**(2024) 11 ILRA 24**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 06.11.2024**

**BEFORE**

**THE HON'BLE ALOK MATHUR, J.**

Writ A No. 9755 of 2024

**Ravikant Shukla ...Petitioner**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Anuj Kudesia, Surya Prakash Singh

**Counsel for the Respondents:**
C.S.C.

**A. Civil Law - Departmental Disciplinary Proceedings - Suspension - Judicial Review of suspension order - Constitution of India,1950 - Article 226 - Order of suspension can be interfered where it is shown that the said order has been passed without jurisdiction or no inquiry is contemplated or the charges levelled against the delinquent government servant are vague and bald and even proved will not entail a major penalty. Merely because the government servant feels that the allegations are false will not be a ground in itself for this Court to assume the jurisdiction and to embark on an inquiry to determine the veracity of the allegations levelled against the government servant. In the instant case, the Court found that the allegations were**

**serious, which required inquiry, and the petitioner would have sufficient opportunity to place all the material before the Inquiry Officer in his defence and also would have a chance of personal hearing before the prescribed authority. (Para 12, 14)**

**A. Civil Law - Initiation of the inquiry proceedings on the basis of an unverified complaint without supporting affidavit - Government Order dated 9th May, 1997 - G.O. dated 09.05.1997 provides that a complaint which is not supported by an affidavit would be unactionable. *Held :* An affidavit is required along with the complaint where the allegations levelled against the government servant were in the personal opinion and knowledge of the person making the said allegation. However if the allegations levelled against the delinquent government servant are otherwise verifiable from the government records or from the records then there would not be any need for obtaining an affidavit in support of the allegations. If the allegations are preceded by a preliminary inquiry then the complaint itself loses its relevance as the decision making authority proceeds further on the basis of preliminary inquiry report. (Para 16, 17, 18)**

**Dismissed.** (E-5)

**List of Cases cited:**

1. Deepak Yadav Vs St. of U.P. & ors (Writ A No. 4054 of 2022)

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

1. Heard Sri Anuj Kudesia, learned counsel for petitioner as well as learned Standing Counsel for respondents.

2. By means of present writ petition, the petitioner has challenged the order dated 21.09.2024 passed by District Development Officer, Sitapur whereby the petitioner has been placed under suspension.

3. It has been submitted by learned counsel for petitioner that petitioner was appointed on the post of Village Development Officer and assigned his duties in Block - Kasmanda, District Sitapur on 10.10.2018 thereafter he has been transferred to Block - Mehmoodabad, District - Sitapur and he joined his duties on 05.07.2023.

4. While discharging his duties, certain complaints were made on the basis of which a three Member Committee was constituted which submitted its report on 23.08.2024. Relying on the reports of three Member Committee by means of impugned order, the petitioner has been placed under suspension in contemplation of the departmental proceedings.

5. A perusal of the impugned order would indicate that the first charge relates to work conducted under Mahatma Gandhi National Rural Employment Guarantee Scheme in construction of Shahid Bhagat Singh Amrit Sarovar at village Panchayat Rajparapur, Block Mehmoodabad, District Sitapur where the allegation is that in fact the work which was shown to have been completed in the records, was never undertaken, and the work being done under the supervision of the petitioner he directly responsible for the same. The second charge relates to the payment pertaining to an amount of Rs. 1459558.00/- the bills of which were uploaded for payment while in fact the bills were never verified by the petitioner in his capacity as Village Development Officer, Mehmoodabad and accordingly the petitioner has been charged for attempting to make payments for which the bills were never verified by him.

6. It has been submitted by learned counsel for petitioner that a bare perusal of the order of suspension and perusal of the charges it has been stated that they are false and vague and with regard to the expenditure vouchers of Rs. 1459658.00/- it was stated that the said bills were uploaded by the Gram Rojgar Sewak without getting the same approved from the petitioner and when the petitioner informed about this fact to the authorities response was sought from The Gram Rojgar Sewak, who in his reply dated 23.09.2024 has admitted that due to his fault the expenditure has been uploaded without verification, and therefore submitted that no further enquiry deserves to be proceeded with when the Gram Rojgar Sewak has admitted his fault.

7. It has further been submitted that the work was duly undertaken and completed which according to three Member Committee was never undertaken and the said allegation itself is false and accordingly there is no reason to proceed against the petitioner in the present case inquiry proceedings and further there was no occasion for the respondents to place the petitioner under suspension. It has been further submitted that inquiry proceedings have been initiated on the basis of a complaint which was never supported by an affidavit and according to the Government Order dated 9th May, 1997 no such inquiry could have been initiated and therefore the entire proceedings are illegal and arbitrary and deserves to be quashed.

8.Learned Standing Counsel on the other hand has opposed the writ petition. Based on written instructions, he has submitted that number of bills and vouchers were duly approved by the petitioner. It was further stated that the allegations against the petitioner are serious in nature and may entail a major penalty and consequently there is no infirmity in the order of suspension and prayed for dismissal of the writ petition.

9. I have heard learned counsel for parties and perused the record.

10. A perusal of the narration of allegations against the petitioner which have been mentioned in impugned order of suspension would indicate that certain complaints have been received against the petitioner on the basis of which a Three Member Committee was constituted where it was found that for the construction of Shahid Bhagat Singh Amrit Sarovar various works which are ought to have been undertaken and completed were never initiated and accordingly the petitioner who was the person responsible for the said work and was responsible for the material lapses which have surfaced as per the Three Member Inquiry Committee report.

11. With regard to the verification of bills which were uploaded is a disputed question of fact as the petitioner submits that he has never verified the said bills which were uploaded by the Gram Rojgar Sewak while the State claims to have sufficient materials indicating that the petitioner had in fact verified the said bills and after uploading of the said bills, the natural consequence would be the payment of the said bills, but this fact came to the knowledge of the authorities through a complaint stating that efforts were being made to have the bills paid despite the fact that no work was done nor was the bills verified.

12. Be that as it may, this court would not go into the disputed question of fact in

a writ petition under Article 226 of Constitution of India challenging the order of suspension. The order of suspension can be interfered with in a very limited grounds where it is shown that the said order has been passed without jurisdiction or no inquiry is contemplated or the charges levelled against the delinquent government servant are vague and bald and even proved will not entail a major penalty. Merely because the government servant feels that the allegations are false will not be a ground in itself for this Court to assume the jurisdiction and to embark on an inquiry to determine the veracity of the allegations levelled against the government servant.

13. It is the duty of the prescribed disciplinary authority to give a charge-sheet to the government servant who in turn would give a reply and after following due procedure prescribed and following the principle of natural justice, a finding must be recorded with regard to the guilt of the government servant and also whether the charges are proved or not. This Court would not prejudge the issue merely because the order of suspension is challenged before this Court assailing the allegations levelled against him. Even otherwise, the order of suspension does not contain the compendium of charges and merely because there is a reference to the nature of allegation cannot be sufficient for this Court to embark upon testing the veracity of the allegations levelled against the delinquent government servant. All these matters are to be dealt with by the Inquiry Officer during the inquiry proceedings.

14. This Court has satisfied itself about the nature of allegations and finds that the allegations are serious which require inquiry, and the petitioner would have sufficient opportunity to place all the material before the Inquiry Officer in his defence and also he would have a chance of personal hearing before the prescribed authority.

15. Accordingly, this Court is of the considered view that merely because the order of suspension has been challenged this Court would not arrogate to itself the power and jurisdiction vested in the disciplinary authority.

16. With regard to the contention that the inquiry proceedings have been initiated on the basis of a unverified complaint without supporting an affidavit and therefore the enquiry itself is illegal and arbitrary. Though in the Government Order dated 9th May, 1997, it has been provided that a complaint which not supported by an affidavit would be unactionable, this Court had duly consider the aforesaid government order in the case of **Deepak Yadav Vs. State of U.P. and others (Writ A No. 4054 of 2022)** and it was observed that if the allegations levelled against the delinquent government servant are otherwise verifiable from the government records or from the records then there would not be any need for obtaining an affidavit in support of the allegations and proceeded to observe that an affidavit would certainly be required along with the complaint where the allegations levelled against the government servant were in the personal opinion and knowledge of the person making the said allegation.

17. The Government Order cannot be read as to prevent an inquiry in a case where on the face of it a government servant may be culpable for misappropriation and other related allegations which can be verified from

public records without resorting to the personal knowledge of the person making such a complaint. In the present case, a perusal of the allegations levelled in the impugned order of suspension it has abundantly clear that matters pertaining to completion of government work and verifying bills for payment are in domain of public documents and these charges can be verified from public records and merely because a complaint is not supported by an affidavit would not aid the petitioner in preventing the inquiry proceedings against him.

18. This Court is also of the considered view that in case the allegations are preceded by a preliminary inquiry then the complaint itself loses its relevance as the decision making authority proceeds further on the basis of preliminary inquiry report. In case, in the preliminary inquiry report, the allegations are found to be correct, recommendation is made for a regular disciplinary proceeding against a person whose name has surfaced to be involved in the preliminary inquiry. In such a situation, it cannot be said that the inquiry would be conducted on the basis of an anonymous complaint which is not supported by an affidavit. Therefore, the status of complaint is merely an information on the basis of which a preliminary inquiry is conducted and further proceedings are conducted based on the recommendations of the preliminary inquiry report. Accordingly, this Court does not agree with the arguments raised by learned counsel of the petitioner that the inquiry proceedings should be set aside merely on account of the fact that the complaint in the present case is not supported by an affidavit.

19. In light of the above, this Court does not find any merit in the contentions and the grounds raised by the petitioner. The writ petition being devoid of merits is **dismissed.**

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**(2024) 11 ILRA 28**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 19.11.2024**

**BEFORE**

**THE HON'BLE ALOK MATHUR, J.**

Writ A No. 9965 of 2024

**Ram Tirath Pno. 802031471 ...Petitioner**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Akhilesh Kumar Pandey

**Counsel for the Respondents:**
C.S.C.

**A. Civil Law – Service Law – Disciplinary Proceedings and Criminal Proceedings – Acquittal in Criminal Proceedings – Effect - Disciplinary proceedings and criminal proceedings are distinct and separate and they do not bar each other. In case an employee is punished in departmental proceedings, it would have no bearing upon the criminal trial even if the allegations are the same and, vis-à-vis, in case an employee is acquitted in the criminal case, it would not have any bearing on the disciplinary proceedings. Each proceeding proceeds on the evidence and material adduced before the respective authorities. Mere acquittal in the criminal case will not diminish, reduce, or extinguish the punishment granted in a disciplinary proceeding. (Para 10)**

**B. Complaint was made by the petitioner's wife alleging that he had married again during the lifetime of his first wife. On her complaint, disciplinary proceedings were initiated against wherein the charge of bigamy was found proved and, by means of order dated 18.01.2010, the petitioner**

**was punished by reverting him to the lowest pay scale for a period of three years. Petitioner never challenged the order dated 18.01.2010 and subsequently superannuated on 28.02.2018. With regard to the allegations of bigamy, an F.I.R. was also lodged by his wife, in which case the petitioner was acquitted. On the strength of the acquittal order, the petitioner prayed for a direction to pay arrears for the period 2010 to 2013 on account of deductions made from his salary pursuant to the punishment order. Held – Deductions made in pursuance of a valid punishment order cannot be set aside merely because of the fortuitous circumstance that on similar allegations the petitioner has been acquitted on criminal charges.(Para 9)**

**Petition dismissed.** (E-5)

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

1. Heard Sri Akhilesh Kumar Pandey, learned counsel for petitioner as well as learned Standing Counsel for respondents.

2. By means of present writ petition, the petitioner has prayed for following prayer:-

*"i. Issue a writ order or direction in the nature of mandamus commanding the opposite parties to provide his deducted amount / arrears for the period of 2010 to 2013 in favour of the petitioner as early as possible, in the interest of justice.*

*ii. Issue a writ order or direction in the nature of mandamus commanding the opposite party No. 3 to decide the representation dated 16.09.2024as contained in Annexure No. 4 as early as possible within stipulated time, in the interest of justice.*

*iii, Issue any other writ order or direction which the Hon'ble Court may deem fit and proper under the circumstances of the case."*

3. It has been submitted that during his service sometime in 2009, an application was made by his wife stating that the petitioner has married again during life of his first wife which is a misconduct. Inquiry was conducted and petitioner was given a show cause notice on 23.12.2009. The petitioner duly replied to the said show cause notice on 08.01.2010 and finding his reply to be evasive, the same was rejected and by means of order dated 18.01.2010 the petitioner was punished by reverting him to the lowest of pay scale for 3 years.

4. The petitioner never challenged the order dated 18.01.2010 and has subsequent superannuated from service on 28.02.2018 from the post of Head Constable. He has further submitted that with regard to the allegations of bigamy a first information report was lodged by his wife being Case Crime No. 4339 of 2009 under Section 494, 498-A I.P.C. at Police Station - Kotwali Nagar, District - Sultanpur. In the said case, the charges were framed and the petitioner was tried but during trial the existence of second marriage could not be established and accordingly, the petitioner was acquitted by means of judgment dated 02.08.2024 passed by Chief Judicial Magistrate, Sultanpur.

5. Merely on the strength of the acquittal order, the petitioner submits that he would now be entitled to the entire deductions made in pursuance of the punishment order dated 18.01.2010 and accordingly a prayer has been made in the present writ petition for a direction to the respondents to pay the arrears for the period 2010 to 2013 for the deduction made

from his salary in pursuance of punishment order.

6. Learned Standing Counsel on the other hand has opposed the writ petition. He has submitted that the order of punishment dated 18.01.2010 was never assailed by the petitioner before any forum and has consequently attained finality. He further submits that the deductions, if any, made only as per the punishment order dated 18.01.2010 and during subsistence of the punishment order the prayer as made by the petitioner in the present writ petition cannot be granted. He submits that merely because the petitioner has been acquitted in a criminal case would have no consequence of the punishment order passed in a disciplinary proceedings.

7. I have heard learned counsel for parties and perused the record.

8. The facts of the present case are not disputed inasmuch as on a complaint made by the wife of the petitioner, disciplinary proceedings was initiated against him for misconduct of bigamy as well as first information report was lodged in Case Crime No. 4339 of 2009 under Section 494, 498-A I.P.C. at Police Station - Kotwali Nagar, District - Sultanpur, the disciplinary proceedings concluded by passing of the punishment order dated 18.01.2010 wherein the charges levelled against the petitioner of bigamy stood proved and he was reverted for the three years to the lowest of the pay scale.

9. The petitioner served in the department 8 years after the order of punishment and superannuated on 28.02.2018 from the post of Head Constable. During his service period, he never challenged the order of punishment dated 18.01.2018 before any authority or forum and accordingly, the said order became final.

10. On the other hand in the criminal proceedings, the charges levelled against the petitioner could not be proved and therefore he was acquitted by the trial court by means of judgment and order dated 02.08.2024 passed by Chief Judicial Magistrate, Sultanpur. It is on the order of acquittal that he has filed the present writ petition seeking a direction that deductions made in pursuance of punishment order dated 18.01.2010 may be restored.

9. Needless to say that the validity of the punishment order dated 18.01.2010 remain unquestioned and accordingly had attained finality. The said order was legal and valid and in case the petitioner had any grievance against the order of punishment, it was open for him to challenge the same in an appeal or before this Court in a writ petition but the petitioner never challenged the same. The deductions made in pursuance of valid order of punishment cannot be set aside merely because of the fortuitous circumstance that on similar allegations, the petitioner has been acquitted on criminal charges.

10. Both the proceedings, namely, disciplinary proceedings and the criminal proceedings are distinct and separate and they do not bar each other. In case the petitioner was punished in departmental proceedings, it would have no bearing upon the criminal trial even if allegations are same and vis-a-vis in case the petitioner is acquitted in the criminal case would not have any bearing on a disciplinary proceedings and each proceeding proceeds on the evidences and materials adduced before the authorities in the said proceedings.

11. In light of the above, this Court is of the considered view that mere acquittal in the criminal case will not diminish, reduce and extinguish the punishment granted in a disciplinary proceedings and accordingly no benefit of the acquittal order can be given to the petitioner in the disciplinary proceedings specially after they have been concluded with award of punishment.

12. In light of the above, this Court does not find any merits in the submissions made by learned counsel for the petitioner. The writ petition is bereft of merits and is accordingly **dismissed.**

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**(2024) 11 ILRA 31**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 20.11.2024**

**BEFORE**

**THE HON'BLE ALOK MATHUR, J.**

Writ A No. 10700 of 2024

**Amit Yadav Head Constable 112622578 ...Petitioner**

**Versus**

**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Syed Anzar Husain, Ashutosh Kumar Srivastava, Ram Krishan Sharma

**Counsel for the Respondents:**
C.S.C.

**A. Civil Law - Departmental Disciplinary Proceedings - Uttar Pradesh Police Officer of Subordinate Ranks, (Punishment and Appeal) Rules, 1991 - Rule 14 - Whether during the pendency of the criminal proceedings, the departmental proceedings should be stayed ? - Departmental as well as criminal, both the proceedings can go simultaneously as there is no bar. The question as to whether during the pendency of the criminal proceedings, the departmental proceedings should be stayed depends upon the facts and circumstances of the case. One of the main consideration for staying of the departmental proceedings during the pendency of the criminal trial is to see that the defence of the delinquent Government Servant is not prejudiced in the criminal trial. Court must record a finding that non grant of stay on a departmental proceedings would not only prejudice the delinquent officer, that the matter also involves complicated question of law (Para 15, 16)**

**B. Civil Law - Departmental Disciplinary Proceedings simultaneously with the criminal trial - In the instant case charges levelled in departmental inquiry and criminal case, emanate from the common incident but the charges in both the proceedings are different. Charges in departmental proceedings relate to violation of the conduct rules and the departmental rules while in the criminal case charge relates to the offence under various sections of the I.P.C. and of the Arms Act. Though the evidence may be common but the legal principles under charges are entirely different. Also petitioner submitted his reply on merits he would be deemed to have subjugated himself to the disciplinary authority. It cannot be said that his defence can be prejudiced during the criminal trial. No infirmity in the departmental disciplinary proceedings simultaneously with the criminal trial. (Para 13, 16)**

**Dismissed.** (E-5)

**List of Cases cited:**

1. Uttar Pradesh & ors. VsBabu Ram Upadhya, AIR 1961 SC 751

2. Uttar Pradesh & ors. VsBabu Ram Upadhya, AIR 1961 SC 751

3.Ajeet Kumar Nag Vs G.M. (P.J.) Indian Oil Corporation, (2005) 8 JT 425

4. Chairman-cum-Managing Director, T.N.C.S. Corporation Ltd. & ors. Vs K. Meerabai, JT 2006 (1) SC 444

5. Suresh Pathrella Vs Oriental Bank of Commerce, AIR 2007 SC 199

6. Union of India & ors. Vs Naman Singh Shekhawat, (2008) 4 SCC 1

7. Indian Overseas Bank Vs P. Ganasen & ors., AIR 2008 SC 553

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

1. Heard Sri Ashutosh Kumar Srivastava, learned counsel on behalf of the petitioner as well as learned Standing Counsel on behalf of the respondents.

2. By means of present writ petition, the petitioner has assailed the charge-sheet dated 19.10.2023 issued by Presiding Officer/Circle Officer, Sadar, District-Gonda and also seeks certiorari to quash the impugned departmental disciplinary proceedings inasmuch as against the petitioner under Rule 14 (1) of the Uttar Pradesh Police Officer of Subordinate Ranks, (Punishment and Appeal) Rules, 1991.

3. It has been submitted that the learned counsel for the petitioner that the petitioner is working on the post of Head Constable in Gonda at the relevant time where a First Information Report was lodged on 04.04.2023 by one Prince Yadav, the brother-in-law of the petitioner under Section 307 I.P.C. the said FIR was lodged against Surendra Yadav, the brother-in-law of the petitioner who is alleged to have assaulted and injured the petitioner due to a family dispute. Investigation into the said occurrence was conducted and it was found that the petitioner's brother-in-law has lodged false First Information Report against Surendra Yadav and the petitioner was also involved in falsely implicating his brother-in-law which fact was established during the investigation. That the petitioner had deliberately got himself injured in order to lodge the First Information Report against the brother-in-law, Surendra Yadav. During the investigations no material was found on which a charge-sheet would be filed against the accused therein namely Surendra Yadav the brother-in-law of the petitioner but Section 195/203/211/109 of the I.P.C. and 3/25/5/27 of the Arms Act was lodged against the petitioner and his brother Prince Yadav and other co-accused who were found to have falsely implicated the brother-in-law of the petitioner. On the conclusion of the investigation a charge-sheet has been filed in the Court of competent jurisdiction on 24.06.2023 where the petitioner is facing the trial.

4. That on the ground of the same facts the departmental proceedings was initiated against the petitioner under Rule 14 (1) of the Uttar Pradesh Police Officer of Subordinate Ranks, (Punishment and Appeal) Rules, 1991. A charge-sheet was issued to the petitioner on 19.10.2023 levelling the allegation of lodging a false First Information Report against the brother-in-law, he has brought disrepute to the name of the entire Police Department. The petitioner denied the allegations levelled against him by submitting his reply on 14.11.2023 and the Inquiry Officer has concluded the inquiry and submitted the inquiry report to the disciplinary authority on 07.08.2024. On submission of the inquiry report the disciplinary authority has issued a show cause notice dated 25.09.2024 asking the petitioner to submit his explanation. It is at this stage that the petitioner has sought to file a present writ petition challenging the entire disciplinary

proceedings as well as the show cause notice dated 25.09.2024 apart from the charge-sheet issued to him.

5. In support of submissions, learned counsel for the petitioner relied upon paragraph 492 of the Uttar Pradesh Police Officer of Subordinate Ranks, (Punishment and Appeal) Rules, 1991, according to which the result of the judicial trial of the Police Officer should be awaited before initiating disciplinary proceeding against him. He has submitted that on the same set of facts, a criminal trial is underway and accordingly the respondents should not have initiated disciplinary proceedings prior to conclusion of the said trial and hence the entire proceedings are illegal and arbitrary and deserves to be quashed. In support of his submissions he relies upon the judgment of the Hon'ble Supreme Court in the case of State of **Uttar Pradesh and others versus Babu Ram Upadhya** reported in **AIR 1961 Supreme Court 751.**

6. On the other hand, learned Standing Counsel has vehemently opposed the writ petition. He submits that the petitioner has submitted himself to the jurisdiction of the disciplinary proceedings inasmuch as he has submitted his reply to the charge-sheet supplied to him and the inquiry is nearly concluded and it is only at the stage of issuance of a show cause notice, the petitioner has approached this Court for filing the present writ petition.

7. The second ground raised by the learned Standing Counsel is that as per the charge levelled against the petitioner is of giving false evidence and filing a false First Information Report against his brother-in-law which is not the allegation in the disciplinary proceedings, which is limited only to bring him by sullying name and reputation of the Police Department because of his actions and submits that both the charges are separate at this stage and according, it cannot be said that for same set of charges, the petitioner is being tried in a criminal record and also departmentally in the disciplinary proceedings.

8. He further submits that there is no such embargo in the Uttar Pradesh Police Officer of Subordinate Ranks, (Punishment and Appeal) Rules, 1991 for simultaneous proceeding with the disciplinary proceedings during pendency of criminal trial, and therefore he submits that there is no reason for this Court to interfere if the sudden proceedings and prayed for dismissed the writ petition.

9. I have heard rival contention of the parties and also perused the record. The entire proceedings have been initiated from lodging of First Information Report by the brother of the petitioner against his brother-in-law under Section 307 of the I.P.C. in FIR No. 299 of 2023 lodged by Police Station- Khalilabad, District- Sant Kabir Nagar. It is when the investigation was carried out by the Investigating Officer, it has found that the allegations levelled in the said First Information Report were patently false and the facts which emanated were rather surprising that a false case was made out with regard to the injury on the petitioner and his brother-in-law was sought to be falsely implicated in the said criminal case.

10. It is further for the aforesaid reason that the Investigating Officer did not find any charge-sheet against the accused named in the said FIR rather he has filed the charge-sheet against the petitioner and his brother under Section 195/203/211/109

of the I.P.C. and 3/25/5/27 of the Arms Act against the petitioner, his brother and the other co-accused who were found to be complicit in lodging of the First Information report. When the facts were brought to the knowledge of the superior authorities of the petitioner, the disciplinary proceedings were initiated and accordingly to the charge-sheet the charge levelled against the petitioner is that he being a Police Officer has indulged in filing of a false criminal case against his brother in law and accordingly has brought disrepute to the name of the Police Department.

11. Accordingly, considering the arguments raised by the petitioner assailing the departmental proceedings it is noticed that the petitioner himself has voluntarily subjected himself to the departmental proceedings inasmuch as he has submitted his reply to the charge-sheet without any demur though reply submitted by the petitioner further indicates that he has stated that the allegations levelled against him or false and he has taken all the defence available to him to show that the charges levelled against him are false and are not made out.

12. Apart from the above, he is also stated that the criminal case is pending in the Court of competent jurisdiction and he is further prayed that the proceeding he stayed till conclusion of the criminal trial.

13. From the above, It is clear that once the petitioner has submitted his reply on merits he would be deemed to have subjugated himself to the disciplinary authority. The only step remaining in the disciplinary proceeding is the reply to be submitted by the petitioner to the show cause notice and the disciplinary authority thereafter is required to take a decision with regard to the guilt or otherwise of the petitioner in the said inquiry. From a bare perusal of the charges levelled in departmental inquiry and criminal case, it is evident that the facts in both emanate from the common incident but the charges in both the proceedings are entirely different. The departmental proceedings of charges are relate to violation of the conduct rules and the departmental rules in the present case pertaining to the bringing down of the reputation of the department while the criminal case but relates to the offence under Section 195/203/211/109 of the I.P.C. and 3/25/5/27 of the Arms Act and though the evidence may be common but the legal principles under charges are entirely different.

14. Considering the case of the petitioner in the light of the judgment of the Hon'ble Supreme Court in the case of **Capt. M. Paul Anthony Vs. Bharat Gold Mines Ltd. & Another** reported in **(1999) 3 SCC 679** where it has been clearly held that the departmental as well as criminal, both the proceedings can go simultaneously as there is no bar and there is being conducted simultaneously. The question as to whether during the pendency of the criminal proceedings, the departmental proceedings should be stayed depends upon the facts and circumstances of the case. In the case of **Ajeet Kumar Nag versus G.M. (P.J.) Indian Oil Corporation** reported in **(2005) 8 JT 425** the Hon'ble Supreme Court has held that the procedure followed as both the case as well as subject matter of departmental inquiry and criminal proceedings are different and it cannot be said that when criminal proceedings are going on a particular criminal charge in that regard, the departmental proceedings cannot be allowed to proceed.

15. Subsequently, the similar views were expressed in the case of **Chairman-cum-Managing Director, T.N.C.S. Corporation Limited and others** versus **K. Meerabai reported in JT 2006 (1) SC 444, Suresh Pathrela** versus **Oriental Bank of Commerce,** reported in **AIR 2007 SC 199** and **Union of India and others versus Naman Singh Shekhawat** reported in **2008 (4) SCC 1** with regard to the issue as to whether the departmental proceeding should be kept in abeyance till the conclusion of criminal trial was also considered by the Supreme Court in the case of **Indian Overseas Bank** versus **P. Ganasen and others** reported in **AIR 2008 SC 553** where the Supreme Court held that where prayer is made that so long as criminal proceedings are going on, departmental proceedings may not be proceeded, the Court must record a finding that non grant of stay on a departmental proceedings would not only prejudice the delinquent officer, that the matter also involves complicated question of law.

16. In the present case, once the petitioner has already submitted himself to the jurisdiction of the disciplinary proceedings, he has submitted his reply that it cannot be said that his defence can be prejudiced during the criminal trial. One of the main consideration for staying of the departmental proceedings during the pendency of the criminal trial is to see that the defence of the delinquent Government Servant is not prejudiced in the criminal trial. This plea is not applicable in the present case inasmuch as the petitioner has already tendered his response to the charge-sheet in the disciplinary proceedings.

17. In the aforesaid circumstances, this Court has no hesitation in holding that it is not a case for interference where the departmental proceedings are being held on the same charges of the criminal trial.

18. Accordingly, I do not find any infirmity in the criminal trial proceedings simultaneously with the criminal trial. The writ petition is being devoid of merit is, accordingly, **dismissed.**

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**(2024) 11 ILRA 35**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 12.11.2024**

**BEFORE**

**THE HON'BLE AJAY BHANOT, J.**

Writ A No. 12642 of 2020

**Smt. Krishnawati ...Petitioner**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Bramh Narayan Singh

**Counsel for the Respondents:**
C.S.C., Manu Singh

**A. Service Law -Constitution of India,1950-Article 226-entitlement to interest on delayed payment of retiral dues, including family pension and provident fund, to the legal heir of a deceased government employee-The petitioner is the widow of govt. employee who died in service-despite receiving a "No Dues Certificate" the retiral dues were not disbursed in a timely manner-After prolonged delays the dues were finally disbursed-The court relied on Yogendra Singh Case and Sanjay Upadhyay Case which establish that delayed payment of pension and retiral dues entitles the beneficiary to interest-The court directed the respondents to pay simple interest at 8% per annum for the delayed period.(Para 1 to 9)**

**The writ petition is allowed.** (E-6)

**List of Cases cited:**

1. Yogendra Singh Vs St. of UP (2016) Law Suit (All) 3850

2. Sanjay Upadhyay & ors Vs St. of U.P. & ors, Writ-A No. 459 of 2019

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

1. Heard Sri Bramh Narayan Singh, learned counsel for the petitioner and learned Standing Counsel for the State respondents.

2. The retiral dues of the petitioner's deceased husband were disbursed to her after a long delay. The petitioner has made an application for grant of interest on the delayed payment. The husband of the petitioner died in harness. No dues certificate in regard to the deceased husband of the petitioner was issued by the competent authority on 14.03.2005 and verified on 18.08.2005 by the respective competent authorities. However the retiral dues were not paid to the petitioner. She was made to run from pillar to post. The petitioner instituted a writ petition before this Court in the year 2019. Despite directions issued by this Court the amount was not disbursed to her which caused the petitioner to file a contempt petition which was registered as Contempt Petition no. 7922 of 2019. Finally the amounts to which the petitioner was entitled upon death of her husband were disbursed on 23.12.2019.

3. The counter affidavit filed on behalf of the State records that the application was filed by the petitioner for release of the provident fund amount, family pension on 18.08.2005. No cause for the delay in processing the family pension and provident fund amount which is the entitlement of the petitioner is disclosed from the counter affidavit.

4. The delay in payment of the aforesaid amount (consequently this Court finds) is entirely due to the apathy of the respondents. The death of an employee renders the family destitute in more ways then one. Apart from losing emotional anchor, the sole bread earner was also lost by the family.

5. In these circumstances it is always expected that the State authorities should discharge their duties with promptitude and empathy as per law. To the contrary the authorities adopted a callous attitude to the plight of the petitioner. The deceased employee's family cannot be harassed for her entitlements by overbearing officials. The respondents are liable to pay interest on the delayed payment.

6. The narrative shall be fortified by authorities in point. In **Yogendra Singh Vs State of U.P. (2016 Law Suit (All) 3850)** this Court held thus:-

"i) Pension and other retiral benefits of all Government employees must be sanctioned / paid in terms of the Rules, 1995 on the eve of their retirement, if there is no legal impediment.

ii) If there is any delay in the payment of retiral benefits and pension, the employee shall be entitled for the interest at the current market rate with effect from the date of his/her retirement till the date of actual payment. The interest on delayed payment shall be paid by the State Government. It will be open to the State Government to recover it from the officer/officials who are found to be guilty for negligence in payment of the pension. If

such official is retired, the amount of the interest shall be recovered from his/her post retiral benefits/pension after furnishing him/her opportunity.

iii) It will be open to the State Government to initiate proceedings against such official for taking action for misconduct in terms of the Rules, 1995, if he is in service.

50. In view of the above, respondents are directed to pay the simple interest at the rate of 9% from the one month after the death of petitioners father till the date of actual payment to them and further to pay the GPF within a month ,if it has already not been paid, along with the interest at the rate of 9% as held above."

7. The aforesaid judgment was followed by this Court in **Sanjay Upadhyay and 5 others Vs State of U.P. and 3 others (Writ-A No. 459 of 2019).**

8. In the wake of preceding discussion and the authorities in point this Court finds that the respondents are liable to pay interest to the petitioner for the delayed payment for pension and other terminal dues of the deceased employee. The interest amount is fixed at 8 percent per annum (considering the rate of interest). The interest shall be payable from 18.08.2005 till 23.12.2019. The interest shall be calculated and released in favour of the petitioner within a period of three months from the date of receipt of a certified copy of this order. In case the amount is not released within the aforesaid period the concerned official shall be held liable for the delayed payment of interest after expiry of three months.

9. The writ petition is allowed.

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**(2024) 11 ILRA 37**

**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 11.11.2024**

**BEFORE**

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

Writ A No. 16420 of 2024

**Smt. Neetu Chaudhary ...Petitioner**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
R.K. Mishra

**Counsel for the Respondents:**
Abhishek Srivastava, C.S.C.

**A. Service Law - Constitution of India,1950-Disciplinary proceedings-Natural justice-Procedural Flaws in Inquiry-Dismissal quashed-The court quashed the dismissal of the petitioner, who was an office Assistant –III in UPPCL, due to procedural irregularities in the disciplinary inquiry-The inquiry committee failed to follow principles of natural justice and procedural requirements (absence of witness examination and cross-examination opportunities and lack of evidence to prove charges beyond presumptions) under the UPPCL Employees(Discipline and Appeal) Regulations 2020-The court emphasized that in disciplinary inquiries leading to major penalties charges must be proven with documentary and oral evidence-The burden of proof lies on the establishment, and procedural safeguards cannot be waived-Thus, the dismissal and appellate orders were set aside-The petitioner was ordered to be reinstated with liberty to the respondents to conduct a fresh inquiry while ensuring adherence to proper disciplinary procedures.(Para 1 to 18)**

**The writ petition is allowed.** (E-6)

**List of Cases cited:**

1. St. of U.P. & ors. Vs Saroj Kr. Sinha (2010) 2 SCC 772

2. Roop Singh Negi Vs PNB & ors. (2009) 2 SCC 570

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

4. St. of U.P. & anr. Vs Kishori Lal & anr. (2018) 9 ADJ 397 DB (LB)

5. Smt. Karuna Jaiswal Vs St. of U.P. (2018) 9 ADJ 107 DB (LB)

6. St. of U.P. Vs Aditya Prasad Srivastava & anr.(2017) 2 ADJ 554 DB (LB)

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

1. This writ petition is directed against an order of the Managing Director, U.P. Power Corporation Limited, Lucknow (for short, 'the Corporation') dated 12th October, 2023 dismissing the petitioner from service and directing recovery of a sum of Rs. 37,94,105/- from the him on account of loss caused to the Corporation. Also, under challenge is an appellate order dated 29.08.2024 passed by the Chairman of the Corporation dismissing the petitioner's departmental appeal and affirming the order of first instance passed by the Managing Director.

2. Shorn of unnecessary details, the petitioner was an Office Assistant-III in the Office of the Executive Engineer Electricity Urban Distribution Division-I, Noida. The petitioner's case is that she was given financial duties within three months of joining service contrary to the Corporation's Circular dated 05.03.1994 which provides for assignment of financial duties to employees after they have put in at least ten years of service. The petitioner was given charge of capital accounts and also mediclaims besides G.P.F. She was also given duties of revenue collection from consumers. The petitioner was asked by the Executive Engineer to return her receipt books, which she indicated in her reply to have already been deposited. Her salary for the month of June, 2016 was stopped but later on released on 15.10.2016. The petitioner's reply was sought, apparently regarding some shortfall in deposit of monies collected. By a letter dated 17.07.2017, the Executive Engineer Electricity Urban Distribution-I, Noida directed the petitioner to deposit a sum of Rs. 37 lacs which she had allegedly collected but not deposited. The petitioner says that there is no evidence by even as much as a hint indicating that the petitioner had not deposited what she had collected. The demand was based on a presumption. The petitioner submitted a detailed reply in the matter on 19.07.2017 clearly showing that the inference was founded on presumptions. It is the petitioner's case that without considering her reply, she was placed under suspension pending inquiry by the Superintending Engineer vide order dated 18.09.2017. She was attached to the Office of the Executive Engineer, Electricity Urban Distribution, VI Noida. She was later on attached to the Office of the Chief Engineer by an order of the Executive Engineer dated 28.10.2017.

3. The grievance also is that subsistence allowance was not regularly paid to the petitioner during the period of her suspension. She was also reported to the Police vide Case Crime No.1090 of 2017, under Sections 420, 409 I.P.C., Police Station Sector 24 Noida, District Gautam Budh Nagar. She was arrested and later on enlarged on bail by this Court vide order dated 03.12.2019 passed in Criminal Misc. Bail Application No. 38507 of 2018.

The petitioner was served with a charge sheet dated 15.10.2020 carrying a charge to the effect that she had failed to deposit the sum of Rs.37,94,015/- in the Corporation's account that she had collected. Another charge that the charge sheet carried was about non maintenance of documents. The petitioner sought copies of the documents relied upon in the charge sheet that were not provided to her, as her case goes, but she was in the end permitted to inspect the original records in the Office of the Managing Director of the Corporation vide letter dated 15.12.2021. The petitioner submitted her reply, answering the charges on 10.05.2022 before the Inquiry Officer, denying the charges and putting forward her defence.

4. It is the petitioner's case that while the inquiry, on the basis of the first charge sheet, was in progress before the Paschimanchal Vidyut Vitran Nigam Limited, whereunder the petitioner was immediately serving, another charge sheet dated 03.08.2022 was served upon the petitioner by the Chief Engineer, Inquiry Committee of the Corporation on the selfsame charges as carried in the earlier charge sheet. The petitioner says that she sought time to answer the second charge sheet, praying a month for the purpose by a letter dated 13.9.2022. She was granted seven days time. The petitioner claims that she sought copies of the evidence, or in the alternate, inspection of documents vide her letter dated 04.11.2022. The case is that without giving her opportunity, the Inquiry Committee submitted their report, holding the petitioner guilty. Amongst other things, it is pleaded in paragraph nos. 20, 27, 28, 30 and 31 of the writ petition that no date, time and place of holding the inquiry was fixed and no witnesses produced by the Establishment in support of the charges.

5. When this petition came up for admission on 22.10.2024, we passed the following order:

"A short point is involved in this writ petition, which is directed against an order of dismissal from service. The point is that no date, time and venue of inquiry was fixed by the Inquiry Officer/Inquiry Committee and that no witnesses were examined by the Establishment in support of the charges.

Issue notice.

Notice on behalf of respondents Nos. 2 and 3, by Mr. Abhishek Srivastava, learned Counsel. He is granted two weeks' time to file a counter affidavit. Ms. Amrita Singh, learned Additional Chief Standing Counsel, accepts notice on behalf of respondent No. 1. She will have the same period of time to file a return, if the first respondent desires to put in one.

Since a short point is involved, let this petition come up again on 11.11.2024.

To be taken up as fresh, along with a report regarding status of pleadings.

It is, however, clarified that respondents Nos. 2 and 3, in filing their affidavits, will particularly answer paragraphs Nos. 20, 30 and 31 of the writ petition.

The Registrar (Compliance) is directed to communicate this order to the Managing Director, U.P. Power Corporation Limited, Lucknow and the Chairman, U.P. Power Corporation Limited, Lucknow, both through the learned Chief Judicial Magistrate, Lucknow within 24 hours next."

6. Two counter affidavits have been filed by Mr. Abhishek Srivastava, Advocate, one on behalf of respondent no. 3 and the other on behalf of respondent no. 2. Both are taken on record. Let these be numbered by the office.

7. Learned counsel for the petitioner waives his right to file a rejoinder.

8. Admit.

9. Heard forthwith.

10. Heard Mr. R.K. Mishra, learned counsel for the petitioner and Mr. Abhishek Srivastava, learned counsel appearing on behalf of respondent nos. 2 and 3 and Mr. S.C. Upadhyay, learned Standing Counsel appearing on behalf of the State.

11. The counter affidavit filed by the Chairman of the Corporation, though asserts that on 18.08.2022 an opportunity of hearing was given to the petitioner fixing the date, time and place on 29.08.2022 at 12 noon for a personal hearing, we do not think that the inquiry was at all held according to the salutary principles governing the holding of inquiries where a major penalty may be imposed. When it is said that date, time and place for holding the inquiry ought be intimated to the delinquent, what is meant is that a date, time and place should be scheduled where evidence on behalf of the Establishment would be heard by the Inquiry Officer. Likewise, in answer to the averments that no witnesses were examined on behalf of the Establishment, all that is said is that Regulation 7(5) of the Uttar Pradesh Power Corporation Limited Employees (Discipline and Appeal) Regulation 2020 (for short, 'the Regulations 2020') requires that along with charge sheet, a copy of the documents and list of witnesses should be provided to the employee, and Regulation 7(7) further provides that in case, the employee denies the charges, the Inquiry Committee should call the proposed witnesses to record their evidence. It is then said that if names of no witnesses are cited in the charge sheet, the Inquiry Committee cannot be said to have committed a mistake in not examining the Establishment's witnesses.

12. We are afraid that the stand taken by the respondents on this score also is utterly flawed. It is by now well settled that salutary principles governing the holding of a departmental inquiry into charges that may lead to imposition of a major penalty, postulate that the Inquiry Officer or Committee must convene themselves formally into an impartial tribunal. Even if they are employees of the Establishment, they must distance themselves from that role and sit as an impartial arbitrator. The Inquiry Committee or the Inquiry Officer must require the Establishment to prove the charges by evidence, produced through a presenting officer, which should include both documentary and oral evidence. It is imperative in major penalty cases that witnesses on behalf of the Establishment, who prove the charges, should be examined. The witnesses produced by the Establishment would prove the documents produced on behalf of the Establishment, and further, testify to other facts that may not be forthcoming by the mute words that the documents carry. Also, it has to be borne in mind that the charges are not true because these come on the credit of a charge sheet put in by the Establishment. Rather, the Inquiry Committee should consider the charges with a clean slate and require the Establishment to prove them in the first instance, by producing evidence, both oral and documentary, as already said. It is after the witnesses for the Establishment have been examined and offered to the delinquent for cross examination that the burden of the Establishment may be said to be over. It is after this stage that the delinquent may be

called upon to establish his defence, again following the same procedure of producing both documentary and oral evidence. Of course, witnesses produced by the delinquent would also be available for cross examination to the Establishment. It is of seminal importance that if the delinquent does not produce any evidence, it is not that the Inquiry Officer must, by that default, accept the Establishment's case proved. The burden still remains on the Establishment to prove the charges by evidence aliunde of the kind and in the manner that we have indicated hereinabove. Apart from it, the day when the Establishment is called upon to lead their evidence, the Inquiry Officer or Committee must fix a date, time and place for that purpose. It is in this sense that the requirement of fixing a date, time and place for holding the inquiry is understood. It is not in the sense in which the respondents have construed it.

13. What the respondents have done, as would appear from the order sheet, is that on 29.08.2022 they heard the petitioner personally without hearing any evidence for the Establishment. This shows that they presumed the charges to be proved. Upon the petitioner complaining that she had not received a copy of the charge sheet, they ensured provision of one to her, directing her to submit a reply within the time specified. They further recorded a statement of the employee to the effect that she did not desire a personal hearing and all that she says in her reply to the charge sheet, the inquiry may be concluded on that basis. It is further recorded that the Inquiry Committee asked the petitioner, if she wants to produce any witness or cross examine anyone; she declined. An affidavit to the same effect in a printed proforma was secured from the petitioner and is annexed to the return. A xerox copy of the affidavit which is on record shows that it hardly conforms to the requirements of an affidavit at all. It does not appear to carry a valid statement made on oath nor does it carry the details of the deponent as required in an affidavit. It also lacks a verification clause. Most importantly, it does not show that the affidavit has been sworn before a notary public empowered by law to certify the deposition.

14. All this apart, the order sheet betrays singular lack of understanding by the respondents of the essentials of a valid inquiry into a charge, likely to lead to the imposition of a major penalty. It does not intimate if 29.08.2022 was the date fixed for hearing evidence on behalf of the Establishment that was the first requirement which the respondents were obliged to undertake. Rather, the Inquiry Committee heard the petitioner in the first instance, instead of the Establishment being required to produce evidence in support of the charges. The assertions that the remark in the order sheet that the petitioner said that she did not want to examine the witnesses, is besides the point. In the order of things it was imperative to require the Establishment to prove the charge by producing their witnesses and of course, leading documentary evidence that was not at all done. The remark that the petitioner said that she did not wish to cross examine witnesses, is again besides the point because no witnesses for Establishment was ever examined, whom she could cross examine.

15. A reading of the order sheet shows that the entire Establishment, in particular, the Inquiry Committee, were utterly ignorant of the essentials of the salutary procedure to hold an inquiry into charges of

this kind and consequence. The petitioner, who is apparently a compassionate appointee and may not be well-versed with the requirements of procedure in departmental proceedings, seems to have gullibly signed, what the respondents call an affidavit in a printed proforma and said that she did not want to cross examine, what the Inquiry Committee recorded in the order sheet. Sadly none of the proceedings, taken in a matter of this enormity where the likelihood of a major penalty loomed large over the petitioner's head, comply with the salutary requirements of holding a valid inquiry as pointed out hereinabove. Also, the inquiry is not in accordance with the Rule 7 of the Regulation 2020 framed by the Corporation themselves.

16. The question that there is a salutary principle which requires, in the case of a major penalty, the fixation of a date, time and place for holding the inquiry, and further, requiring the Establishment to prove the charges through production of oral and documentary evidence before the Inquiry Committee by a presenting officer on their behalf, is well acknowledged in view of the law laid down by the Supreme Court in **State of Uttar Pradesh and others v. Saroj Kumar Sinha, (2010) 2 SCC 772, Roop Singh Negi v. Punjab National Bank and others, (2009) 2 SCC 570, State of Uttaranchal and others v. Kharak Singh, (2008) 8 SCC 236 and the Bench decisions of this Court in State of U.P. and another v. Kishori Lal and another, 2018 (9) ADJ 397 (DB) (LB), Smt. Karuna Jaiswal v. State of U.P., 2018 (9) ADJ 107 (DB) (LB) and State of U.P. v. Aditya Prasad Srivastava and another, 2017 (2) ADJ 554 (DB) (LB).**

17. In view of what we have said above, the inquiry being flawed, the orders passed by the Disciplinary Authority as well as the Appellate Authority cannot be sustained. The orders would have to be quashed with liberty to the respondents to proceed afresh. Of course, in the interregnum, the petitioner would have to be reinstated in service subject to terms that we have indicated hereinafter.

18. The writ petition is **allowed.** The impugned order dated 12.10.2023 passed by the Managing Director, U.P. Power Corporation Limited, Lucknow as well as the order dated 29.08.2024 passed by the Chairman, U.P. Power Corporation Limited, Lucknow are hereby **quashed.** The respondents shall reinstate the petitioner in service but it would be open to the respondents to proceed afresh against her on the basis of the charge sheet, on the foot of which the impugned order was passed.

19. It is made clear that if the respondents elect to proceed afresh against the petitioner, it will be open to them to place the petitioner under suspension. In the event, the respondents elect to pursue fresh proceedings, the petitioner shall be entitled to her current salary but emoluments for the period during which she has remained out of service, shall abide by the final result of the disciplinary proceedings. In the event further that the respondents also elect to place the petitioner under suspension pending inquiry, the petitioner shall be entitled to subsistence allowance from the date of that order which shall be paid regularly without asking her to furnish a non alternative engagement certificate. In either case, if disciplinary proceedings are pursued afresh by the respondents, the same shall be expedited and concluded early wherein the petitioner will cooperate.

20. Costs easy.

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**(2024) 11 ILRA 43**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 13.11.2024**

**BEFORE**

**THE HON'BLE AJAY BHANOT, J.**

Writ A No. 17117 of 2024

**Saurabh Srivastava ...Petitioner**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Rahul Mishra, Saroj Kumar Yadav, Vikram Bahadur Singh

**Counsel for the Respondents:**
C.S.C., Hare Ram

**A. Service Law - Transfer Policy - Principle of "Last Come First Go" – Classification of Teachers on Basis of Length of Service - Constitution of India, Art. 14 - Test of Reasonable Classification under Article 14 - U.P. Basic Education (Teachers) Service Rules, 1981 - U.P. Basic Education Teachers Service Regulations, 1981 - Right to Education Act, 2009 - U.P. Right of Children to Free and Compulsory Education Rules, 2011 – Clauses 3, 7, 8, & 9 of the Government Order dated 26.06.2024 issued by the Basic Education was challenged. Clause 3 provided that surplus teachers as per the bench mark of the pupil-teacher ratio are to be shifted to schools where such bench mark remains unfulfilled. Clause 7 provides that transfer of teachers would be under the principle of "last come first go" whereby the junior most teacher would be shifted out first. Clauses were challenged on the ground that it would entail frequent transfers of junior teachers while maintaining senior teachers in the same school for years together. *Held:* Impugned clauses of the G.O. do not indicate any reasoning as to why the aforesaid principle is required to be followed for transfer/adjustment of teachers. By introducing such a concept, a classification has been made pertaining to those teachers who have been posted in a particular school longer than others who have been posted there subsequently. If the aforesaid procedure prescribed under the impugned clauses is kept intact, it would entail frequent transfer of junior teachers while keeping intact the posting of senior teachers for all times to come since a teacher after transfer and joining in another district would ipso facto remain a junior. No intelligible differentia has been indicated either in the Government Order, the circular or even in the counter affidavit . Procedure for "last in first out" also does not appear to have any rational nexus with the object sought to be achieved by the Act of 2009 and the Rules framed thereunder. Court found the classification to be discriminatory and failing the test of reasonable classification. (Para 57, 58, 59)**

**B. Civil Law - Service Law - U.P. Basic Education (Teachers) Service Rules, 1981 – Clauses 3, of the G.O. dated 26.06.2024 – Inclusion of Shiksha Mitra in Parity with Assistant Teachers Impermissible under Service Rules – Clause 3 of the Government Order, which provides for transfer or adjustment by considering the number of Shiksha Mitra employed in a particular school, for determination of Pupil-Teacher Ratio is contrary to the Service Rules of 1981. Qualifications required for appointment as an Assistant Teacher are not applicable to Shiksha Mitras, and therefore, the Government Order clearly erred in equating the two. Inclusion of Shiksha Mitra in parity with Assistant Teachers is impermissible, as executive orders can only supplement statutory provisions but cannot supplant or override them. Evidently, unequals have been treated as equals. (61, 62, 63)**

**Dismissed.** (E-5)

**List of Cases cited:**

1. Smt. Reena Singh Vs St. of U.P. & ors., writ petition No. 25238 (S/S) of 2018

2. Govind Kausik & ors. Vs St. of U.P. & ors., Writ A No.10686 of 2024

3. Neerja & ors. Vs St. of U.P. & ors., Writ A No.9970 of 2024

4. Jitendra Singh Rajput & anr. Vs St. of U.P. & ors., Writ A No.11049 of 2024

5. Sarita Rani & ors. Vs St. of U.P. & ors., Writ A No.19345 of 2018

6. U. P. Gram Panchayat Adhikari Sangh & ors. Vs Daya Ram Saroj & ors., (2007) 2 SCC 138

7. Mary Pushpam Vs Televi Curusunary & ors. , Civil Appeal No.9941 of 2016

8. Pandit M.S.M. Sharma Vs Dr. Shri Krishan Sinha & ors. AIR 1960 SC 1186,

9. Charanjit Lal Vs Union of India AIR 38 SCC 1951

10. U.O.I. Vs Alphinstone Shipping and Weaving Comp. Ltd. 2001 Vol.1.-IV SCC 139 a

11. St. of Uttranchal Vs Sandeep Kumar Singh & ors., (2010) 12 SCC 794

12. St. of M.P. Vs Narmada Bachao Andolan & anr., (2011) 7 SCC 639

13. Kalyan Chandra Sarkar Vs Rajesh Ranjan @ Pappu Yadav & anr., (2005) 2 SCC 42

14. Bilkis Yakub Rasool Vs U.O.I., (2024) 5 SCC 481

15. Census Commissioner & ors. Vs R. Krishnamurthy, (2015) 2 SCC 796

16. Ramesh Chandra Sharma & ors. Vs St. of U.P. & ors., (2024) 5 SCC 217

17. Association for Democratic Reforms and Another (Electoral Bond Scheme) Vs U.O.I. & ors., (2024) 5 SCC 1

18. Amarendra Kumar Mohapatra Vs St. of Orissa & ors. (2014) 4 SCC 583

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

1. Shri Rahul Mishra and Shri Vikram Bahadur Singh, learned counsel for the petitioner, Sri Hare Ram, learned counsel for the BSA and Ms. Shruti Malviya, learned brief holder on behalf of the State.

2. By the impugned order dated 04.10.2024, the appointment of the petitioner has been cancelled on the footing that his educational testimonials/certificates pertaining to the TET Examination were found to be forged.

3. The petitioner was noticed by order dated 27.04.2024 that his educational certificates of TET were found to be forged. A report from the Board of the High School and Intermediate Education dated 02.09.2020 which had purportedly issued the said certificate had recorded that the petitioner had failed in the TET Examination. The documents adverse to the petitioner including the report of the Board of High School and Intermediate Education were served upon the petitioner along with the show cause notice. The petitioner in response to the show cause notice acknowledged the receipt of the aforesaid report issued by the Board of High School and Intermediate Education dated 02.09.2020. The reply to the show cause notice by the petitioner adverts to certain disputes in the TET-2011 Examination results. The petitioner has also stated that the actual results of the petitioner can be determined if his answer sheets are summoned and evaluated by the employer.

4. The response of the petitioner did not find favour with the authority and hence the impugned order. The impugned order adverts to the report sent by the Board of High School and Intermediate

Education dated 02.09.2020 along with other relied on documents and finds that the TET certificate of the petitioner was forged. The appointment of the petitioner was vitiated by the fraud and accordingly his services were terminated.

5. The natural justice cannot be cast in a strait-jacket formula. The principles of natural justice are applied with a view to the facts of a particular case. In the instant case, the petitioner was put to notice on the charges of fraudulent educational certificates against him. The documents adverse to the petitioner and proposed to be relied upon by the respondent-department were duly served upon him. The petitioner was given an opportunity to reply to the show cause notice. The petitioner as tendered his defence to the charges enumerated in the show cause notice. The aforesaid reply submitted by the petitioner was duly considered in the impugned order. One of the tests of proper application of the principles of natural justice is whether any prejudice has been caused to the noticee by the procedure adopted by the disciplinary authority. No prejudice was caused to the petitioner by the procedure adopted by the authority. In the facts of this case, principles of natural justice has been duly complied with. The impugned order is supported with reasons & there is no perversity in the same.

6. The question now arises as to whether a regular departmental enquiry ought to have been conducted in the facts of this case. The applicability of the UP Government Servant Discipline and Appeal Rules, 1999 for the purposes of holding a regular departmental enquiry in similar facts fell for consideration before a learned Division Bench of this Court in **District Basic Education Officer and another vs. Punita Singh and others. 1**

7. In the case of **Punita Singh *(supra),*** the services of the petitioner were terminated on the footing that her educational certificates were forged and fabricated. The question arose whether in these facts, the issuance of show cause notice and compliance of broad principles of natural justice were sufficient to meet the ends of justice or it was imperative to hold a regular departmental enquiry. In this context, while considering the applicability of Rules, 1999, the learned Division Bench of this Court held :

*"16. From the above determination, it is apparent that the University has categorically indicated that the documents relied on by the respondent for seeking employment were totally forged and fabricated. Neither before the learned Single Judge nor before this Court any attempt has been made to negate the finding recorded about the eligibility/qualification documents being forged and fabricated.*

*17. The learned Single Judge allowed the writ petition only on the ground that termination of employment amounts to imposing major penalty and the same could not have been imposed without holding inquiry under Rules of 1973/Rules of 1999.*

*18. A Division Bench of this Court in **Zila Basic Shiksha Adhikari, Balrampur Vs. Anand Kumar Tripathi and others : 2024:AHC-LKO:37313-DB**, in a case where compassionate appointment accorded to the respondent therein, was terminated on account of failure to produce relevant documents as regard his parentage, etc., the Division Bench, on the question whether in such case show cause notice should be issued and thereafter order of cancellation of appointment should be passed or a full*

*fledged inquiry in terms of Rules of 1999 should be held followed by removal or dismissal, came to the conclusion that disciplinary proceedings are ordinarily initiated if any misconduct has been committed after joining service, therefore, if the initial appointment itself was fraudulent, then referring to the judgment of Hon'ble Supreme Court in* ***R. Vishwanatha Pillai Vs. State of Kerala and others : (2004) 2 SCC 105, and Patna High Court judgements in Ishwar Dayual Sah Vs. State of Bihar : 1987 Lab IC390 and Rita Mishra Vs. Director, Primary Education : 1988 Lab IC 907,*** *came to the following conclusion:*

*"12. Taking a cue from the ratio of the decision of the Supreme Court, we are of the opinion that if it is ultimately found on inquiry referred earlier that the opposite party no. 1 had practiced fraud or deceit to obtain the appointment as already discussed, then, it would be a case to proceed for cancellation of appointment by issuing a show cause notice for the said purpose annexing the inquiry report and material collected in such inquiry and then considering the reply of the appointee in this regard and taking a reasoned decision after affording an opportunity of personal hearing for cancellation of appointment and not necessarily for dismissal or removal of service, therefore, there is no question of any inquiry to be held in terms of Rules, 1999 as has already been held in the aforesaid decision of the Supreme Court.*

*13. This will be sufficient observance of principles of natural justice. It may also be pointed out that an employee of Basic Education Department does not have the benefit of Article 311 of the Constitution of India as Article 311 of the Constitution of India would not apply, however, the relevant rules for disciplinary proceedings for imposition of major punishment such as removal, dismissal etc. would apply, but, for the reasons aforesaid, those will also not apply if on a fact finding inquiry it is found that the appointment was obtained by fraud, as already observed hereinabove and thereafter the aforesaid procedure is followed."*

*19. Recently, Hon'ble Supreme Court in* ***Union of India Vs. Prohlad Guha etc.: 2024 SCC OnLine SC 1865****, in a case where the writ petitions filed by the employees were allowed for not following the Railway Servants (Discipline & Appeal) Rules, 1968 and on coming to the conclusion that qua a person in regular service, the dismissal cannot take place sans any disciplinary inquiry, while setting aside the judgement, came to the following conclusion:*

*"13. The impugned judgment is liable to be set aside on a further ground, since the requisite to establish eligibility for compassionate appointment was not properly fulfilled, they were appointed on the basis of false claims and fabricated documents. It then becomes imperative to discuss what constitutes fraud and what is its impact on an act afflicted by such vice. R.M. Sahai, J. writing in* ***Shrisht Dhawan (Smt.) v. M/s. Shaw Brothers*** *observed –*

*"20. Fraud and collusion vitiate even the most solemn proceedings in any civilised system of jurisprudence. It is a concept descriptive of human conduct. Michael Levi likens a fraudster to Milton's sorcerer, Comus, who exulted in his ability to, 'wing me into the easy-hearted man and trap him into snares'. It has been defined as an act of trickery or deceit. In Webster's Third New International Dictionary fraud in equity has been defined as an act or omission to act or concealment by which one person obtains an advantage against conscience over another or which equity or*

*public policy forbids as being prejudicial to another. In Black's Legal Dictionary, fraud is defined as an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or surrender a legal right; a false representation of a matter of fact whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury. In Concise Oxford Dictionary, it has been defined as criminal deception, use of false representation to gain unjust advantage; dishonest artifice or trick. According to Halsbury's Laws of England, a representation is deemed to have been false, and therefore a misrepresentation, if it was at the material date false in substance and in fact. ...From dictionary meaning or even otherwise fraud arises out of deliberate active role of representator about a fact which he knows to be untrue yet he succeeds in misleading the representee by making him believe it to be true. The representation to become fraudulent must be of a fact with knowledge that it was false.*

*.....The colour of fraud in public law or administrative law, as it is developing, is assuming different shades. It arises from a deception committed by disclosure of incorrect facts knowingly and deliberately to invoke exercise of power and procure an order from an authority or tribunal. It must result in exercise of jurisdiction which otherwise would not have been exercised. That is misrepresentation must be in relation to the conditions provided in a Section on existence or non-existence of which power can be exercised.*

*13.1. The words of Denning L.J. in* ***Lazarus Estates Ltd. v. Beasley*** *are of importance qua the impact of fraud. He wrote –*

*".....I cannot accede to this argument for a moment. No Court in this land will allow a person to keep an advantage he has obtained by fraud. No judgment of a Court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The Court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved, it vitiates judgment, contract and all transactions whatsoever...."*

*13.2. 'Fraud' is conduct expressed by letter or by word, inducing the other party to take a definite stand as a response to the conduct of the doer of such fraud. [See;* ***Derry v. Peek; Ram Preeti Yadav v. U.P. Board of High School of Intermediate Education]***

*13.3 In* ***R. Vishwanatha Pillai v. State of Kerala****, a Bench of three learned Judges observed that a person who held a post which he had obtained by fraud, could not be said to be holding a post within the meaning of Article 311 of the Constitution of India. In this case, a person who was not a member of Scheduled Castes, obtained a false certificate of belonging to such category and, as a result thereof, was appointed to a position in the Indian Police Service reserved for applicants from such category.*

*14. The above discussion reiterates that fraud vitiates all proceedings. Compassionate appointment is granted to those persons whose families are left deeply troubled or destitute by the primary breadwinner either having been incapacitated or having passed away. So when persons seeking appointment on such ground attempt to falsely establish their*

*eligibility, as has been done in this case, such positions cannot be allowed to be retained. So far as the submission of non-compliance of the Rules is concerned, the judgment in Vishwanatha Pillai (supra) answers the question. The Respondent-employees in the present case, having obtained their position by fraud, would not be considered to be holding a post for the purpose of the protections under the Constitution. We are supported in this conclusion by the observations made in Devendra Kumar v. State of Uttaranchal. In paragraph 25 thereof it was observed –*

*"25. More so, if the initial action is not in consonance with law, the subsequent conduct of a party cannot sanctify the same. Sublato fundamento cadit opus - a foundation being removed, the superstructure falls. A person having done wrong cannot take advantage of his own wrong and plead bar of any law to frustrate the lawful trial by a competent court. In such a case the legal maxim nullus commodum capere potest de injuria sua propria applies. The persons violating the law cannot be permitted to urge that their offence cannot be subjected to inquiry, trial or investigation. (Vide Union of India v. Major General Madan Lal Yadav [(1996) 4 SCC 127: 1996 SCC (Cri) 592: AIR 1996 SC 1340] and Lily Thomas v. Union of India [(2000) 6 SCC 224: 2000 SCC (Cri) 1056].) Nor can a person claim any right arising out of his own wrongdoing (jus ex injuria non oritur)."*

*(Emphasis supplied)*

*15. The impugned judgment passed by the High Court, in view of the above discussion, is set aside and the order passed by the Tribunal dismissing the Respondent-employees' Original Applications is restored. The Respondent- employees were rightly dismissed from service by the Appellant-employer. ……."*

*20. From the above, it is well established that in case, the employment has been obtained based on fraudulent documents, the beneficiary of such fraud cannot seek that procedure prescribed under the Rules of 1999 must be followed.*

*21. So far as the judgment in the case of* ***Smt. Parmi Maurya (supra)*** *relied on by counsel for the respondent is concerned, it was a case where the Division Bench came to the conclusion that petitioner therein, was not afforded adequate opportunity of hearing. However, in the present case, it is ex facie clear from the order impugned that she was provided adequate opportunity with regard to her documents being forged and fabricated and the only plea raised by her was that she would produce duplicate copies of the said documents and neither in the writ petition nor in the present appeal, she has been able to produce any further document/material to substantiate that the mark-sheets issued to her, were not forged and fabricated. "*

8. The case at hand is squarely covered by the law laid down in **Punita (supra).**

9. In the wake of preceding discussion, there is no infirmity in the procedure adopted by the respondents while passing the impugned order and the impugned order is lawful and just. The writ petition is liable to be dismissed and is **dismissed.**

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**(2024) 11 ILRA 48**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 20.11.2024**

**BEFORE**

**THE HON'BLE ABDUL MOIN, J.**

Writ A No. 24901 of 2021

**Km. Farha ...Petitioner**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Yogesh Chandra Srivastava

**Counsel for the Respondents:**
C.S.C., Puneet Chandra

**A. Service Law -Constitution of India,1950-Article 226-UP Recruitment of Dependedants of Government Servants Dying in Harness Rules,1974-The petitioner challenged the rejection of her claim for compassionate appointment after her brother died in harness-the claim was based on Rules 1974 as amended in 2011, which allows an unmarried sister of a deceased government servant to seek compassionate appointment-The Allahabad High Court clarified that a "divorced" individual qualifies as "unmarried" for the purpose of compassionate appointment under Rules 1974-The court held that a divorce being legal dissolution of marriage, renders a person unmarried in status unless they remarry-A non-speaking rejection order, lacking application of mind or reasoning, violates principles of natural justice and is liable to be quashed-The court directed the competent authority to reconsider the claim within a stipulated period, ensuring compliance with the law and fair application of the Rules.(Para 1 to 16)**

**The writ petition is allowed.** (E-6)

**List of Cases cited:**

Mohinder Singh Gill & anr. Vs the Chief Election Commr. New Delhi & anr.(1978) AIR 851 AIR

(Delivered by Hon'ble Abdul Moin, J.)

1. Heard learned counsel for the petitioner, learned Standing Counsel for respondent no. 1 and Shri Puneet Chandra, learned counsel for respondents no. 2 and 3.

2. Under challenge is the order dated 02.03.2020, a copy of which is annexure 5 to the writ petition, passed by respondent no. 3 wherein the claim of the petitioner for compassionate appointment has been rejected. Further prayer is for a writ of mandamus commanding the respondents to grant employment to the petitioner under the U.P. Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974 (hereinafter referred to as the Rules 1974) as amended in the year 2011.

3. Bereft of unnecessary details the facts of the case are that the petitioner's brother namely Shri Nihal Ahmad who was working under respondent no. 3 died in harness on 13.08.2019. As Shri Nihal Ahmad was a divorcee consequently the petitioner in the capacity of being unmarried sister staked her claim for being appointed on compassionate grounds. Admittedly the respondent no. 1 has adopted the Rules 1974 with certain amendments as per office order dated 29.09.2012, a copy of which is annexure 9 to the writ petition, per which it is apparent that an unmarried sister of a deceased government servant who was unmarried would also be eligible for being appointed on compassionate grounds.

4. Learned counsel for the petitioner contends that Shri Nihal Ahmad had given divorce to his wife in April 2006. The competent court namely the Principal Judge, Family Court, Lucknow in Regular Suit No. 702 of 2006 in re: Shri Nihal Ahmad vs Smt Shahiba vide order dated 25.01.2012, a copy of which is annexure 1 to the rejoinder affidavit, has accepted the compromise between the parties per which both the parties i.e. Shri Nihal Ahmad and his wife have agreed about divorce as entered into between them in April 2006.

5. The contention of learned counsel for the petitioner is that once the divorce

took place in April 2006 and was duly recognized by the competent court of law vide its order dated 25.01.2012 as such on the date of death of Shri Nihal Ahmad on 13.08.2019 he would fall within the ambit of being unmarried and thus the petitioner was perfectly eligible for being considered for compassionate appointment which claim has been rejected vide order impugned dated 02.03.2020 with patent non application of mind by simply indicating that after consideration of the Rules it has not been found feasible to appoint the petitioner on compassionate grounds.

6. The contention of learned counsel for the petitioner is that although in the order impugned no reasons emerges as to why the claim of the petitioner for compassionate appointment has been rejected yet in the counter affidavit which has been filed by the respondents it has simply been averred that the divorce of Shri Nihal Ahmad, the brother of the petitioner, is null and void in the eyes of law and it is not duly executed and the status of Shri Nihal Ahmad remains married.

7. It is contended that the aforesaid reasons as indicated by the respondents in the counter affidavit cannot be considered to be a reasonable or valid ground for rejection of claim of the petitioner for compassionate appointment as no such ground has been taken in the order impugned dated 02.03.2020 and as such the said reason is not liable to be considered keeping in view the law laid down by Hon'ble Supreme Court in the case of **Mohinder Singh Gill and another vs the Chief Election Commissioner, New Delhi and another, AIR 1978 AIR 851.**

8. Apart from it, it is contended that once the order impugned does not indicate any reason consequently the order impugned is a non speaking order which merits to be quashed.

9. On the other hand, Shri Punit Chandra, learned counsel for the respondents no. 2 and 3 has tried to justify the order impugned by indicating the fact that even though there might have been divorce entered into between Shri Nihal Ahmad and his wife in the year 2006 yet he would not fall within the ambit of being unmarried in the capacity of being a 'divorcee' at the time of his death and consequently there is no error in the order impugned.

10. Having heard learned counsel for the parties and having perused the record it emerges that the petitioner's brother Shri Nihal Ahmad died in harness on 13.08.2019. Shri Nihal Ahmad is said to have divorced his wife in April 2006. The competent court vide its order dated 25.01.2012 has also recognised the divorce in terms of the compromise entered into between the parties meaning thereby that at the time of death i.e on 13.08.2019 Shri Nihal Ahmad cannot be said to be married thus the ground as had been taken by the respondents in the counter affidavit that Shri Nihal Ahmad was married at the time of death is patently misconceived in as much as a divorced person cannot be said to be married by any stretch of imagination.

11. In this regard, the Court may see the definition of "divorce" "divorcee" and "divorced" as finds place in Cambridge Advanced Learner's Dictionary, 3rd Edition which defines "divorce" "divorcee" and "divorced" as follows:

*"Divorce: When a marriage is ended by an official or legal process.*

*Divorcee: someone who is divorced and who has not married again.*

*Divorced: married in the past but not now married."*

12. The Black's Law Dictionary, 9th Edition defines "divorce" as follows:

*"The legal dissolution of a marriage by a court."*

12. From perusal of aforesaid definitions as given in Cambridge Advanced Learner's Dictionary as well as Black's Law Dictionary it clearly emerges that divorce is marriage ended by official or legal process or a legal dissolution of marriage, divorcee is a person who is divorced and has not married again and divorced is married in the past but not now married. Thus once a person has not married again he would obviously fall within the ambit of being unmarried though he may be a divorcee.

13. Accordingly, when the grounds as taken in the counter affidavit filed by the respondents are seen vis a vis the definitions as indicated above it clearly emerges that the contention on the part of the respondents that as the deceased brother of the petitioner was a divorcee consequently he would fall within the ambit of being married is patently misconceived and consequently the said ground is rejected.

14. The further aspect is that a perusal of the order impugned dated 02.03.2020 would indicate that no reasons emerge as to why the claim of the petitioner for compassionate appointment has been rejected. It is settled position of law that every order should be a speaking order in as much as reasons should emerge reflecting application of mind by the competent authority on the disputes which arrive before him.

15. As already indicated above, the order impugned dated 02.03.2020 does not indicate as to why the claim of the petitioner for compassionate appointment has been rejected and thus it is apparent that the order impugned is patently non-speaking.

16. Keeping in view the aforesaid discussion, the writ petition is **allowed.**

17. The order impugned dated 02.03.2020, a copy of which is annexure 1 to the writ petition, is quashed.

18. The competent authority i.e. respondent no. 3 is directed to pass a fresh order on the claim of the petitioner for compassionate appointment keeping in view the aforesaid discussion.

19. Let such an order be passed within six weeks form the date of receipt of a certified copy of this order.

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**(2024) 11 ILRA 51**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 14.11.2024**

**BEFORE**

**THE HON'BLE ALOK MATHUR, J.**

Writ A No. 31358 of 2021

**Dr. Prabhanshu Srivastava ...Petitioner**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Sachin Upadhyay, Shivendra S Singh Rathore, Shivendra Shivam Singh Ra

**Counsel for the Respondents:**
C.S.C., Ashok Shukla, Raj Kumar Upadhyaya (R.K. Upadhyaya)

**A. Service Law -Constitution of India,1950-Article 226-Temporary Government Servants(Termination of Service Rules),1975-The petitioner was appointed as Dental Surgeon and he was terminated under Rules 1975 citing unauthorized absence-The court held that the petitioner's appointment was substantive and on a permanent post making the Rules 1975 inapplicable-The termination order was stigmatic since it accused the petitioner of absconding which requires proper inquiry and an opportunity to respond-The court cited several Supreme court judgments that stigmatic orders must follow due process-Failure to provide such procedural safeguards renders the termination arbitrary, illegal, and violative of article 14 and 16 of the Constitution of India-thus, the termination order was quashed-The petitioner was directed to be reinstated with all consequential benefits from the date of his appointment.(Para 1 to 26)**

**The writ petition is allowed.** (E-6)

**List of Cases cited:**

1. Purshottam Lal Dhingra Vs U.O.I. (1958) AIR SC 36

2. Shamsher Singh Vs St. of Punj. (1974) 2 SCC 831

3. St. of Bih. Vs Gopi Kishore Prashad (1960) AIR SC 689

4. Jagdish Mitter Vs U.O.I. & ors. (1964) SC 449

5. Shemsher Singh Vs St. of Punj & ors. (1974) 2 SCC 831

6. Dipti Prakash Banerjee Vs Saytendra Nath Bose National Centre for Basic Sciences, Calcutta & ors. (1999) 3 SCC 60

7. Kamal Kishore Laskhman Vs Pan American World Airways (1987) 1 SCC 146

8. Indra Pal Gupta Vs M/C Model Inter College (1984) 3 SCC 384

9. U.O.I. & ors. Vs Mahaveer C. Singhvi (2010) SC 3493

10. Guj. Steel Tubes Ltd. Vs Guj. Steel Tubes Mazdoor Sabha(1980) 2 SCC 593

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

1. Heard Sri Shivendra S Singh Rathore, Advocate, for the petitioner as well as the learned standing counsel for the opp. parties/State and R.K. Upadhyaya, Advocate, for the opp. party No. 4, and perused the records.

2. The petitioner being aggrieved by his order of termination dated 30.11.2021 has approached this court seeking a writ in the nature of Certiorari quashing the said order.

3. It has been submitted by the learned counsel for the petitioner that an advertisement was issued on 31.12.2017 for appointment on newly created 595 posts of Dental Surgeon under the Department of Medical Health and Child Welfare, U.P. The petitioner being eligible for the said selection applied in the said vacancy. He was successful in the recruitment process and vide order dated 04.10.2020 appointment letter was issued to him on permanent post against the substantial vacancy.

4. Prior to the said advertisement and selection, the petitioner had appeared for the MDS exam for post-graduate education in the Speciality of Pedodontics and Preventive Dentistry on 14.12.2018 and he was selected in the post-graduate course and had taken admission in the Government Dental College and Hospital,

Nagpur, Maharashtra. The result of the recruitment for the post of Dental Surgeon under the Medical Health and Child Welfare, U.P., were not declared till the petitioner was admitted and joined in 2019 for the post-graduate course and it is only in 2020 that the results were declared and he was selected on the post of Dental Surgeon under the Medical Health and Child Welfare, U.P. It is in the aforesaid circumstances that the petitioner made an application to the Department of Medical and Health for grant of study-leave. The respondent did not consider application for grant of study-leave, consequently, he was constrained to file a Writ Petition No. 13652 of 2020, Santoshni Samal & anr. v. State of U.P. & 2 ors., which was disposed of by this court with a direction to the opp. parties to pass appropriate order on the representation of the petitioner, by means of order dated 15.03.2021.

5. The respondents duly considered the representation of the petitioner and rejected the same on the ground that the petitioner was a Probationer and was not entitled for the study-leave. The petitioner being aggrieved by the order of rejection dated 22.07.2021 filed another writ petition before this court being Writ Petition No. 22235 of 2021(SS) titled as Dr. Prabhanshu Srivastava v. State of U.P., on which notices were issued and it is pending consideration before this court.

6. It is during pendency of the aforesaid writ petition that on 20.12.2021 the petitioner went to join his services at the place of posting on 30.12.2021, but he was informed that his services had already been terminated by means of the impugned order dated 30.11.2021, however, a perusal of the impugned order indicates that the petitioner had already joined on 10.10.2020 and from the very next date he had proceeded on leave and it is for his unauthorized absence that his services have been terminated under the Uttar Pradesh Temporary Government Servants (Termination of Service) Rules, 1975.

7. The learned counsel for the petitioner while assailing the order of termination dated 30.11.2021 has submitted that he was appointed on a substantial post according to the service rules by following the due procedure and accordingly submitted that he could not have been subjected to the provisions of Uttar Pradesh Temporary Government Servants (Termination of Service) Rules, 1975 as he did not fall into the category of temporary governmant servant. He further submitted that the definition of 'temporary service' has been provided under Rule -2, according to which 'temporary service' means officiating or substantial service on a temporary post or officiating service on a permanent post under the Uttar Pradesh Government. He submitted that he was regularly appointed on a substantial vacancy and consequently it cannot be said that he was on 'temporary service'. On the other hand, there is no dispute that the post on which the petitioner was appointed was not a temporary post and unless these two conditions are fulfilled, a person would not fall under the definition of 'temporary service', hence the provisions of Rules of 1975 would not be applicable on the services of the petitioner.

8. He further submits that apart from the above, the impugned order is stigmatic inasmuch as the reason for termination has been stated in the order itself, which is that the petitioner has absented himself from duties since 11.10.2020, due to which his services could not be availed by the Public at large and, consequently, his services are no longer required.

9. It is stated that imputation regarding his absence to be intentional and due to his non-absence, the public at large has been adversely effected, is a clearly stigma on the petitioner and submits that such an order could not have been passed without giving due opportunity of hearing to the petitioner. In support of his submissions he has relied upon the judgment of the supreme court in the case of ***Purshottam Lal Dhingra v. Union of India, AIR 1958 SC 36; Shamsher Singh v. State of Punjab, 1974 (2) SCC 831***, to canvass his submissions that in case the order casts stigma, the effect of such an order of termination may have on person's future prospects of employment, is a matter of relevant consideration and though it may have been open for the respondents to have passed an order simplicitor of termination, but such an order casting sigma on the petitioner would be bad, illegal, arbitrary and accordingly deserves to be set aside.

10. He further submits that from bare perusal of the impugned order it would be evident that no notice or any opportunity of hearing was provided to the petitioner prior to passing of the said order and accordingly the said order is clearly illegal, arbitrary and violative of Articles 14 and 16 of the Constitution of India.

11. The learned Standing counsel, on the other hand, has opposed the writ petition. He has submitted that the petitioner had submitted his joining on 10.10.2020 and from the very next date, i.e., 11.10.2020 he absconded from his duties during the period of probation, without obtaining any permission/sanction and, accordingly, as per Rule-3 of the Rules of 1975 his services have been terminated by means of the impugned order dated 30.11.2021. Learned Standing Counsel further submitted that the issue pertaining to the grant of extraordinary leave/study leave is under consideration before this court in Writ Petition No. 22235 of 2021, Dr. Prabhanshu Srivastava v. State of U.P., but submits that the unauthorized absence of the petitioner is clearly an act of misconduct and there is no infirmity in passing the order of termination.

12. I have heard rival contentions of the parties and perused the record.

13. The facts are not in dispute inasmuch as the petitioner being a medical graduate had applied for the post of Dental Surgeon, which was advertised by the U.P. Public Service Commission on 30.12.2017 and he being eligible was duly appointed to the said post by means of order dated 04.10.2020. It is prior to declaration of the result for appointment as Dental Surgeon that the petitioner had appeared in the Master in Dental Surgeon (MDS) Examination and was successful and was pursuing his post-graduate course in the Government Dental College and Hospital, Nagpur, Maharashtra, when the appointment letter was issued. The petitioner moved the application for grant of study-leave, which was rejected and is presently the subject matter of Writ Petition No. 22235 of 2021. According to the petitioner, when he attempted to join his place of posting on 20.12.2021, he was informed that his services had already been terminated on 30.11.2021.

14. According to the impugned order dated 30.11.2021 passed by the Secretary, Department of Medical Health and Child Welfare, U.P., it is stated that the petitioner was in the cadre of Uttar Pradesh Dental Surgeon and was temporarily employed and that he had absconded from his

workplace from 11.10.2020 due to which benefit of his services could not be availed by the Public at large and consequently his services are no longer required and according to the Uttar Pradesh Temporary Government Servants (Termination of Service) Rules, 1975 his services are dispensed with giving him one month's notice.

15. Considering the arguments of the petitioner that his services could not have been terminated invoking the provisions of Rules of 1975, it is noticed that it was necessary for the respondents to have considered as to whether the petitioner falls in the definition of 'temporary service'. To invoke the provisions of Section 2 of the rules of 1975, it was necessary that the services of the government servant should not have been 'officiating or substantive on temporary post' or 'officiating service on permanent post' under the Uttar Pradesh Government. There is no dispute that the petitioner was substantially appointed on a permanent post and, accordingly, his services were not on a temporary post and clearly he was not on officiating service on a permanent post. Basic ingredients of "temporary service" being absent with regard to the services of the petitioner he could not have been said to be in temporary service and, hence, Section 3 of Rules of 1975 would be inapplicable in the case of the petitioner. Rule-3 clearly provides that services of the government servant in temporary service are liable to be terminated at any time by notice in writing given either by the government servant to the appointing authority or by the appointing authority to the government servant, hence, it is necessary that the services of such employee have to be 'temporary service'.

16. Accordingly, this court is of the considered view that services of the petitioner did not fall within the definition of 'temporary service' and, hence, the impugned order has been passed without jurisdiction, is illegal and arbitrary and liable to be set aside.

17. Apart from the above, it is further noticed that stigma has been cast upon the petitioner to the extent that he has been held to have absconded from service and due to his absence from service the Public at large has been deprived of his services. This adverse comment upon the petitioner amounts to stigma and accordingly any order passed by the respondents casting stigma on any employee, can be passed only after giving due opportunity of hearing.

18. Mere form of the order using expressions "terminate", 'discharge' etc, is not conclusive and despite the use of such innocuous expressions, the Court can examine the matter to find out the true nature of the order terminating the service of the petitioner. This has been the consistent view of the Supreme Court in several Constitution Bench decisions rendered in ***Parshottam Lal Dhingra vs. Union of India AIR 1958 SC 36, State of Bihar vs. Gopi Kishore Prashad AIR 1960 SC 689, Jagdish Mitter vs. Union of India and others 1964 SC 449, Shemsher Singh vs. State of Punjab and others 1974(2) SCC 831.***

19. Supreme Court in Dipti ***Prakash Banerjee vs. Saytendra Nath Bose National Centre for Basic Sciences, Calcutta and others, (1999) 3 SCC 60***, observed as follows:-

*"25. In the matter of `stigma', this Court has held that the effect which an order of termination may have on a person's future prospects of employment is*

*a matter of relevant consideration. In the seven Judge case in* ***Samsher Singh vs. State of Punjab [1974 (2) SCC 831], Ray,CJ*** *observed that if a simple order of termination was passed, that would enable the officer to "make good in other walks of life without a stigma. "It was also stated in* ***Bishan Lal Gupta vs. State of Haryana [1978 (1) SCC 202]*** *that if the order contained a stigma, the termination would be bad for* ***"the individual concerned must suffer a substantial loss of reputation which may affect his future prospects".***

20. In ***Kamal Kishore Lakshman vs. Pan American World Airways, 1987 (1) SCC 146,*** Supreme Court explained the meaning of 'stigma' and what amounts to 'stigma' as follows(p150):

*"According to Webster's New World Dictionary, it* ***(stigma) is something that detracts from the character or reputation of a person, a mark, sign etc., indicating that something is not considered normal or standard.*** *The Legal Thesuras by Burton gives the meaning of the word to be blemish, defect, disgrace, disrepute, imputation, mark of disgrace or shame. The Webster's Third New International Dictionary gives the meaning as a* ***mark or label indicating a deviation from a norm.*** *According to yet another dictionary `stigma' is a matter for moral reproach."*

21. A three Judge Bench decision in ***Indra Pal Gupta vs. Managing Committee, Model Inter College (1984) 3 SCC 384,*** is a clear authority for the proposition that the material which amounts to stigma need not be contained in the order of termination of the probationer but might be contained in any document referred to in the termination order or in its Annexures. Obviously, such a document could be asked for or called for by any future employer of the probationer. In such a case, the order of termination would stand vitiated on the ground that no regular inquiry was conducted.

22. Supreme Court in ***Union of India and others vs. Mahaveer C. Singhvi AIR, 2010 SC 3493***, observed as follows:-

*"15. The High Court also referred to the Special Bench decision of this Court is* ***Shamsher Singh v. State of Punjab and Anr. MANU/SC/0073/1974: AIR SC 2192: MANU/SC/0073/1974:1974(2) SCC 831*** *which was a decision rendered by a Bench of seven judges, holding that the decisive factor in the context of the discharge of a probationer from service is* ***the substance of the order and not the form in determining whether the order of discharge is stigmatic or not or whether the same formed the motive for foundation of the order.***

*31.....Not only is it clear from the materials on record, but even in their pleadings the petitioners have themselves admitted that the order of 13th June, 2002, had been issued on account of the Respondent's misconduct and that misconduct was the very basis of the said order. That being so,* ***having regard to the consistent view taken by this Court that if an order of discharge of a probationer is passed as a punitive measure, without giving him an opportunity of defending himself, the same would be invalid and liable to be quashed,*** *and the same finding would be also apply to the Respondent's case. As has also been held in some of the cases cited before us****, if a findings against a probationer is arrived at behind his back on the basis of the enquiry conducted into the allegations made against him/her and*

***if the same formed the foundation of the order of discharge, the same would be bad and liable to be set aside.*** *On the other hand, if no enquiry was held or contemplated and the allegations were merely a motive for the passing of an order of discharge of a probationer without giving him a hearing, the same would be valid. However, the latter view is not attracted/to the facts of this case.....This case, in our view, is not covered by the decision of this Court in Dipti Prakash Banerjee's case (supra)".*

23. In what circumstances, an order of termination of a probationer can be said to be punitive depends upon whether certain allegations which are the cause of the termination or the motive of the foundation of the order.

24. In ***Gujarat Steel Tubes Ltd. vs. Gujarat Steel Tubes Mazdoor Sabha, (1980) 2 SCC 593,*** Supreme Court explained 'foundation' as follows:-

*"A termination effected because the master is satisfied of the misconduct and of the consequent desirability of terminating the service of the delinquent servant, it is a dismissal, even if he had the right in law to terminate with an innocent order under the standing order or otherwise. Whether, in such a case the grounds are recorded in a different proceeding from the formal order does not detract from its nature. Nor the fact that, after being satisfied of the guilt, the master abandons the enquiry and proceeds to terminate.* ***Given an alleged misconduct and a live nexus between it and the termination of service the conclusion is dismissal. even if full benefits as on simple termination, are given and non-injurious terminology is used.***

*On the contrary, even* ***if there is suspicion of misconduct the master may say that he does not wish to bother about it and may not go into his guilt but may feel like not keeping a man he is not happy with. He may not like to investigate nor take the risk of continuing a dubious servant. Then it is not dismissal but termination simpliciter,*** *if no injurious record of reasons or punitive pecuniary cut-back on his full terminal benefits is found. For, in fact, misconduct is not then the moving factor in the discharge."*

25. The distinction between "foundation" and "motive" was explained in ***Dipti Prakash Banerjee (supra):***

***"If findings were arrived at in an enquiry as to misconduct, behind the back of the officer or without a regular departmental enquiry, the simple order of termination is to be treated as "founded" on the allegations and will be bad.*** *But if the enquiry was not held, no findings were arrived at and the employer was not inclined to conduct an enquiry but, at the same time he did not want to continue the employee against whom there were complaints, it would only be a case of motive and the order would not be bad. Similar is the position* ***if the employer did not want to enquire into the truth of the allegations because of delay in regular departmental proceedings or he was doubtful about securing adequate evidence. In such a circumstance, the allegations would be a motive and not the foundation and the simple order of termination would be valid.***

26. Accordingly applying the tests and laid down the Supreme Court in the aforesaid judgements, the order stating that the petitioner had "absconded" from

service, due to which the services could not be available the public at large, clearly casts stigma upon the petitioner. Any person who is said to have "absconded" meaning thereby he has deliberately fled from his duty without obtaining proper action, reflects adversely on the conduct of any comment servant and hence casting an implication that the petitioner has absconded his cast stigma, and such an importation could not have been levelled without giving him proper opportunity of hearing. In the present case no show cause notice nor any opportunity was given to the petitioner, and accordingly such an order casting stigma on him could not have been passed and hence the same is illegal and arbitrary and libel to be set aside.

In the light of the above, the writ petition is **allowed.** Order dated 30.11.2021 is hereby **quashed.** The petitioner is directed to be reinstated with all consequential benefits from the date of his appointment.

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**(2024) 11 ILRA 58**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 14.11.2024**

**BEFORE**

**THE HON'BLE RAJAN ROY, J.**
**THE HON'BLE BRIJ RAJ SINGH, J.**

Writ C No. 9723 of 2024

**Pnb Housing Finance Ltd. ...Petitioner**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Nitesh Kumar Tripathi, Saumya

**Counsel for the Respondents:**
C.S.C.

**A. Recovery Law – Constitution of India,1950 – Article 226 – Writ – Maintainability – SARFAESI Act, 2002 – Section 14 – Execution of an order passed u/s 14 of the Act, 2002 was sought by secured creditor – Alternative remedy to approach the DM or CJM available – Though the order passed u/s 14 was challenged by the borrower u/s 17, but there is no interim order – Effect – Held, it is the District Magistrate or the Chief Metropolitan/Judicial Magistrate are obliged to take possession of such assets and documents relating thereto, and to forward such assets & documents to the secured creditor – It is not the secured creditor, who after obtaining an order u/s 14 of the Act, 2002, is supposed to run from pillar to post or to the police personnel to get the order executed – High Court granted liberty to the petitioner/ secured creditor to move the application before the Chief Judicial Magistrate for execution of the order passed u/s 14 – High Court further directed the officer to verify as to whether there is any interim order in favour of borrower or not in a proceeding u/s 17. (Para 4, 5 and 6)**

**Writ petition disposed off.** (E-1)

**List of Cases cited:**

1. Writ C No. 8867 of 2024; Bank of Baroda Vs St. of U.P. & ors. decided on 25.10.2024

2. Writ C No. 8867 of 2024; Bank of Baroda Vs St. of U.P. & anr.decided on 25.10.2024

(Delivered by Hon'ble Rajan Roy, J.
&
Hon'ble Brij Raj Singh, J.)

Heard.

1. This is a petition under Article 226 of the Constitution of India seeking execution / enforcement of the order dated 13.09.2024 passed in Case No. 74239 of 2024 under Section 14 of the SARFAESI Act, 2002 (hereinafter referred to as "the

Act, 2002"), as actual physical possession of the secured asset has not yet been provided to the petitioner, who is the secured creditor.

2. The order dated 13.09.2024 has been challenged by the borrower under Section 17 of the Act, 2002 before Debt Recovery Tribunal but, there is no interim order. If it is so, i.e. there is no stay, then it is for the officer who has passed the order to ensure its execution in terms of Section 14 (1-A), (2) & (3) of the Act, 2002 which reads as under:-

*"14. Chief Metropolitan Magistrate or District Magistrate to assist secured creditor in taking possession of secured asset.?*

***(1.) Where the possession of any secured assets is required to be taken by the secured creditor or if any of the secured assets is required to be sold or transferred by the secured creditor under the provisions of this Act, the secured creditor may, for the purpose of taking possession or control of any such secured assets, request, in writing, the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction any such secured asset or other documents relating thereto may be situated or found, to take possession thereof, and the Chief Metropolitan Magistrate or, as the case may be, the District Magistrate shall, on such request being made to him?***

***(a) take possession of such asset and documents relating thereto; and***

***(b) forward such asset and documents to the secured creditor:"***

*[Provided that any application by the secured creditor shall be accompanied by an affidavit duly affirmed by the authorised officer of the secured creditor, declaring that?*

*(i) the aggregate amount of financial assistance granted and the total claim of the Bank as on the date of filing the application;*

*(ii) the borrower has created security interest over various properties and that the Bank or Financial Institution is holding a valid and subsisting security interest over such properties and the claim of the Bank or Financial Institution is within the limitation period;*

*(iii) the borrower has created security interest over various properties giving the details of properties referred to in sub-clause (ii)above;*

*(iv) the borrower has committed default in repayment of the financial assistance granted aggregating the specified amount;*

*(v) consequent upon such default in repayment of the financial assistance the account of the borrower has been classified as a non-performing asset;*

*(vi) affirming that the period of sixty days notice as required by the provisions of sub-section (2) of section 13, demanding payment of the defaulted financial assistance has been served on the borrower;*

*(vii) the objection or representation in reply to the notice received from the borrower has been considered by the secured creditor and reasons for non-acceptance of such objection or representation had been communicated to the borrower;*

*(viii) the borrower has not made any repayment of the financial assistance in spite of the above notice and the Authorised Officer is, therefore, entitled to take possession of the secured assets under the provisions of sub-section (4) of section*

*13 read with section 14 of the principal Act;*

*(ix) that the provisions of this Act and the rules made thereunder had been complied with:*

*Provided further that on receipt of the affidavit from the Authorised Officer, the District Magistrate or the Chief Metropolitan Magistrate, as the case may be, shall after satisfying the contents of the affidavit pass suitable orders for the purpose of taking possession of the secured assets [within a period of thirty days from the date of application]:*

*[Provided also that if no order is passed by the Chief Metropolitan Magistrate or District Magistrate within the said period of thirty days for reasons beyond his control, he may, after recording reasons in writing for the same, pass the order within such further period but not exceeding in aggregate sixty days.]*

*Provided also that the requirement of filing affidavit stated in the first proviso shall not apply to proceeding pending before any District Magistrate or the Chief Metropolitan Magistrate, as the case may be, on the date of commencement of this Act.]*

***[(1A) The District Magistrate or the Chief Metropolitan Magistrate may authorise any officer subordinate to him,?***

***(i) to take possession of such assets and documents relating thereto; and (ii) to forward such assets and documents to the secured creditor.]***

***(2.) For the purpose of securing compliance with the provisions of sub-section (1), the Chief Metropolitan Magistrate or the District Magistrate may take or cause to be taken such steps and use, or cause to be used, such force, as may, in his opinion, be necessary.***

***(3.) No act of the Chief Metropolitan Magistrate or the District Magistrate [any officer authorised by the Chief Metropolitan Magistrate or District Magistrate] done in pursuance of this section shall be called in question in any court or before any authority."***

4. The above quoted provision evidently says that the District Magistrate or the Chief Metorpolitan Magistrate may authorize any officer subordinate to him (i) to take possession of such assets and documents relating thereto; and (ii) to forward such assets and documents to the secured creditor. This makes intention of the legislature clear, that, it is the District Magistrate or the Chief Metropolitan Magistrate (who in the State of U.P. would be the Chief Judicial Magistrate) are obliged to take possession of such assets and documents relating thereto, and to forward such assets & documents to the secured creditor. Therefore, it is not the secured creditor who after obtaining an order under Section 14 of the Act, 2002 who is supposed to run from pillar to post or to the police personnel to get the order executed, it is the obligation of the aforesaid officer. Further, for the purpose of securing compliance with the provisions of Sub-section (1) of the Act, 2002, the Chief Metropolitan Magistrate or the District Magistrate may take or cause to be taken such steps and use, or cause to be used, such force, as may, in his opinion, be necessary. This also makes it clear that it is the statutory obligation of the District Magistrate or the Chief Metropolitan Magistrate / Chief Judicial Magistrate, to take or cause to be taken such steps and use, or cause to be used, such force, as may, in his opinion, be necessary. In fact, a separate execution case or enforcement case need not be registered either by the District Magistrate or the Chief Judicial Magistrate, but after passing of requisite

orders under Section 14 of the Act, 2002, its execution should also be ensured and after possession has actually been handed over to the secured creditor, only then the proceedings under Section 14 should be consigned and treated as concluded, not prior to it. It appears that after passing of such orders, the District Magistrates or the Chief Judicial Magistrates leave the secured creditor to the mercy of the police personnel, as if, it is the secured creditor who has to get the order enforced through the police, which is not the correct legal position. In judgment dated 25.10.2024 rendered in ***Writ C No. 8867 of 2024, Bank of Baroda Vs. State of U.P. and 8 others***, we have already held that there is no requirement of issuing notice to the Borrower in such proceedings under Section 14. However, we must clarify that a reasonable time say of at least 15 days should be given to the occupant of the secured asset to vacate the premises so that he may shift his belongings.

5. In view thereof, the petitioner is granted liberty to move an application before the Chief Judicial Magistrate who has passed the order on 13.09.2024, who shall take cognizance for enforcement of his orders in terms of the aforesaid provisions, and then ensure its execution / enforcement at the earliest, keeping in mind the intent and object of the provision contained in the Act, 2002 as the recent judgment of this Court dated 25.10.2024 passed in ***Writ C No. 8867 of 2024, Bank of Baroda Vs. State of U.P. and 8 others.***

6. This order is being passed without prejudice to the rights of the borrower who has preferred an application under Section 17 of the Act, 2002 and the officer aforesaid shall verify as to whether there is any interim order in favour of the borrower by the Debt Recovery Tribunal or not; and thereafter, proceed to enforce his orders. The Senior Registrar of this Court at Lucknow shall communicate this order to Chief Judicial Magistrate, Lucknow for compliance.

7. We direct Shri Raj Bux Singh, learned Additional Chief Standing Counsel to communicate this order to the Chief Secretary, U.P., for circulation amongst the District Magistrates in the State of U.P.. Likewise, a copy of this order be also sent to the Director, Judicial Training Research Institute, Lucknow, U.P..

8. The writ petition is **disposed of** in the aforesaid terms.

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**(2024) 11 ILRA 61**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 04.11.2024**

**BEFORE**

**THE HON'BLE SUBHASH VIDYARTHI, J.**

Writ C No. 1000315 of 2012
With
Writ C No. 1000491 of 2012

**Hindustan Aeronautics Ltd. ...Petitioner**
**Versus**
**Hindustan Aeronautics Karmchari Sabha & Ors. ...Respondents**

**Counsel for the Petitioner:**
P.K. Sinha

**Counsel for the Respondents:**
C.S.C., Avinash Pandey, Dhruv Mathur, Pranav Agarwal, Ravindra Kr. Yadav, Vasundhara Mathur, Virendra Misra

**A. Labour Law – Contract Labour (Regulation and Abolition) Act, 1970 – Section 10(1) – Industrial Disputes Act,**

**1947 – Sections 2(a) & 39 – Industrial dispute – Reference to Tribunal for adjudication – Competence of St. Govt. – Appropriate authority concerning to Hindustan Aeronautics Ltd. (HAL) – Whether Central Govt. or St. Govt. – Holding of shares in the company – Relevance – Held, the Central Government is the appropriate Government in respect to the industrial disputes concerning HAL, which is a Government Company in which more than 51% shares are held by the Central Government – The Central Government having delegated its powers to the St. Government u/s 39 of the Central Act, the St. Government is legally authorized to exercise the delegated power in respect of HAL. (Para 77 and 78)**

**B. Labour Law – Industrial Disputes Act, 1947 – Sections 7-A & 39 – UP Industrial Dispute Act, 1947 –Section 4-B – Industrial dispute – Competence of Government to refer the dispute – Whether Central Govt. u/s 7-A of the Central Act or St. Govt. u/s 4-B of the St. Act – Held, if the Central Government can refer a dispute to an Industrial Tribunal constituted by the St. Government, the same can also be done by the St. Government in exercise of powers delegated by the Central Government u/s 39 of the Central Act – St. Government has the power to refer the dispute concerning HAL to the Industrial Tribunal constituted u/s 4-B of the St. Act. (Para 80 and 81)**

**C. Labour Law – Industrial Disputes Act, 1947 – Section 10(4) – Industrial dispute – Reference – Competence of Tribunal to decide reference which was not referred to it – Held, Tribunal was required to examine the question whether the workmen in question can be treated as employees of HAL keeping in view their long continuous service – Finding returned by the Industrial Tribunal, that the contract between HAL and the canteen contractor was sham, was beyond the scope of reference and it has been recorded without jurisdiction. (Para 84 and 87)**

**D. Labour Law – Industrial Disputes Act, 1947 – Section 2(k) – Industrial dispute – Employer – Competence of Tribunal to decide dispute, which is not 'industrial dispute' – The employees were working in canteen and they were not performing any duties relating to the principal business of HAL, i.e., manufacturing parts of aircrafts – Effect – Held, unless HAL is found to be the employer of the workmen in question, the dispute between the workmen and HAL is not an 'industrial dispute' within the meaning of the expression used in the Industrial Disputes Act and the Tribunal has no jurisdiction to adjudicate upon the dispute between HAL and the workmen – Tribunal has no jurisdiction to examine the validity of the contract between HAL and the canteen contractor and to record a finding that the contract is sham. (Para 98, 99 and 112)**

**E. Labour Law – Industrial dispute – Back wages – Entitlement – Right of employee to claim against HAL, who is the principal employer – Enforceability – Held, back wages are payable only when the employees are illegally restrained from working, although they are willing to perform their duties – The employees were employed by the canteen contractor and HAL was merely their principal employer. Therefore, the employees had no right to claim reinSt.ment and regularization in HAL and they having declined to perform the duties assigned by HAL, had no right to claim any back wages. (Para 117 and 118)**

**F. Labour Law – Industrial Disputes Act, 1947 – Sections 25-K & 25-N – Industrial dispute – Retrenchment – Establishment having less than 100 employees – Applicability of Section 25-N – Held, requirement for attracting Section 25-N is that not less than one hundred workmen were employed in the establishment on an average per working day for the preceding twelve months, which is not the case here. Therefore, the provision of Section 25-N will not apply to the present case. (Para 121)**

**Employer's Writ allowed and employee's Writ dismissed.** (E-1)

**List of Cases cited:**

1. Steel Authority of India Ltd. Vs U.O.I.; (2006) 12 SCC 233

2. ITC Limited & ors. Vs St. of Karn. & ors.; (1995) Supp SCC 476

3. Bangalore Water Supply Vs A Rajappa & ors.; (1978) 2 SCC 213

4. Bhavnagar University Vs Palitana Sugar Mill Pvt. Ltd. &Ors; (2003) 2 SCC 111

5. J. N. Ganatra Vs Morvi Municipality; (1996) 9 SCC 495

6. TISCO Ltd. Vs St. of Jharkhand; (2014) 1 SCC 536

7. Air India Statutory Corp. Vs United Labour Union; (1997) 9 SCC 377

8. Indian Petrochemicals Corp. Ltd. Vs Shramik Sena; (1999) 6 SCC 439

9. Balvant Rai Saluja Vs Air India; (2014) 9 SCC 407

10. Writ C No. 1002796 of 2003; Hindustan Aeronautics Ltd. Vs St. of U.P. & ors. decided on 01.04.2024

11. Gujarat Electricity Board Vs Hind Mazdoor Sabha; (1995) 5 SCC 27

12. Deepali Gundu Surwase Vs Kranti Junior Adhyapak Mahavidyalaya (D.ED.) & ors.; (2013) 10 SCC 324

13. Hindustan Aeronautics Ltd. Vs Hindustan Aeronautical Canteen Kamgar Sangh; (2007) 15 SCC 51

14. Hindustan Aeronautics Ltd. Vs Workmen; (1975) 4 SCC 679

15. Heavy Engineering Mazdoor Union Vs St. of Bihar; (1969) 1 SCC 765

16. Hindustan Aeronautics Ltd. Vs Hindustan Aeronautical Canteen Kamgar Sangh; (2007) 15 SCC 51

17. SAIL Vs National Union Waterfront Workers; (2001) 7 SCC 1

18. Nashik Workers Union Vs Hindustan Aeronautics Ltd.; (2016) 6 SCC 224

19. International Airport Authority of India Vs International Air Cargo Workers' Union: (2009) 13 SCC

20. BHEL Vs Mahendra Prasad Jakhmola; (2019) 13 SCC 82

21. Kirloskar Brothers Ltd. Vs Ramcharan; (2023) 1 SCC 463

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

1. Writ C No. 1000315 of 2012 has been filed by Hindustan Aeronautics Ltd. (hereinafter referred to as "HAL") seeking quashing of an award dated 09.08.2011 passed by the Presiding Officer, Industrial Tribunal (II), U.P., Lucknow in Award Case No. 52 of 2023, which has been published on 20.10.2011. By means of amendment, the petitioner has challenged validity of the reference made by the State Government on 22.07.2003 under Section 10(1)(d) of the Industrial Disputes Act, 1947 to the Industrial Tribunal (II), Lucknow for adjudication of the following questions:-

(i) Whether termination of services of 57 employees working in canteen of HAL, Lucknow, by the employer M/s Hindustan Aeronautics Ltd., Lucknow on 25.11.2000 and 23.12.2000, is proper and legal? If not, to what relief the employees are entitled.

(ii) Whether it would be proper and legal to treat the workmen as employees of HAL, Lucknow keeping in view their long continuous service? If yes, its effect.

2. WRIT - C No. - 1000491 of 2012 has been filed by Hindustan Aeronautics Karmchari Sabha (hereinafter referred to as "HAKS") challenging the validity of the

award dated 19.10.2011 passed by the Industrial Tribunal to the extent it has disallowed the claim for payment of back wages for the period between retrenchment and reinstatement of the workmen and HAKS has sought a Writ of Mandamus commanding HAL to pay the entire back wages to the members / workmen for the aforesaid period.

3. As both the Writ Petitions challenge the same award and are based on the same set of facts, these are being decided by this common judgment.

4. Briefly stated, the facts pleaded in Writ C No. 1000315 of 2012 are that HAL is a Government Company registered under Section 617 of the Companies Act, 1956 (which is similarly worded as Section 2(45) of the Companies Act, 2013). It established a factory at Lucknow in the year 1971-72 for manufacturing accessories of aircrafts. A canteen was set up in the factory premises for providing eatables to the workmen at subsidized rates. The canteen was being operated by a contractor, who engaged workers to run the canteen. Initially, the contract to run the canteen was granted to one Sri. Chunni Lal Bhasin, who engaged manpower for running the canteen and paid wages to them. HAL reimbursed the contractor for the wages paid to the canteen employees.

5. On 24.04.1990, the Governor of U.P., in consultation with U.P. State Contract Labour Advisory Board, issued a Notification under Section 10(1) of Contract Labour (Regulation and Abolition) Act, 1970 (hereinafter referred to as "the Contract Labour Act") prohibiting employment of contract labour in engineering industries situated in the State, except M/s Jay Vijay Metal Industries, Varanasi and BHEL, Haridwar. Vide letter dated 14.05.1990, HAL requested the U.P. Government for granting exemption from the applicability of the Contract Labour Act, in furtherance of which, the State Government issued a Notification dated 04.03.1991 whereby HAL, Lucknow and its Units at Kanpur and Korva (Sultanpur) were also included in the Notification dated 24.04.1990, thereby granting exemption to HAL from the provisions of the Contract Labour Act.

6. HAL claims that in view of the aforesaid exemption granted to it from the provisions of the Contract Labour Act, it was free to engage workers through contractors and, accordingly, workers in the canteen were also engaged by the contractor, who was given the contract to operate the canteen at subsidized rates. The contractors were free to engage persons of their choice and HAL had no say in it.

7. Hindustan Aeronautics Karmchari Sabha, Lucknow (hereinafter referred to as "the HAKS") had submitted an application to the Labour Commissioner, U.P., Kanpur claiming that the persons working in canteen should be paid wages equal to the wages being paid to unskilled workmen who are directly employed in the petitioner's factory. The aforesaid claim was registered as Case No. 18 of 1985 under Contract Labour Act and it was decided by means of an order dated 23.04.1989 wherein the Labour Commissioner held that the persons employed through contractor do not perform the same duties as are performed by the workmen directly employed in the factory, but still they are entitled to wages equivalent to the wages being paid to unskilled laborers employed directly. Other claims regarding changes in service

conditions were rejected. HAL challenged the aforesaid order by filing Writ Petition No. 4553 of 1989, which was dismissed by means of a judgment and order dated 28.01.1994 passed by this Court. HAL challenged the aforesaid order by filing SLP No. 8768 of 1994, which too was dismissed by means of an order dated 11.07.1994.

8. The dispute started when Hindustan Aeronautics Employees Association, Lucknow (HAEA) demanded that instead of the facility of a subsidized canteen, HAL employees should be paid canteen allowance and this demand was accepted by HAL. Thereafter HAKS started opposing the grant of canteen allowance and replacement of subsidized canteen by market rate canteen.

9. On 22.06.2000 an agreement was entered into between Hindustan Aeronautics Employees Association, Lucknow (HAEA) and the Management of HAL, Accessories Division, Lucknow regarding revision of wage structure and other demands, before the Assistant Labour Commissioner wherein it was inter alia agreed that the establishment would discontinue the subsidized canteen facilities and switch over to a system of payment of Canteen Allowance. On 23.06.2000, the General Secretary HAEA made a demand for payment of canteen allowance in pursuance of the settlement dated 22.06.2000.

10. On 25.11.2000, the contract between HAL and the canteen operator Satish Sahni for running a subsidized canteen was terminated. On 27.11.2000 a fresh contract for running the canteen at market rates was entered into between HAL and the canteen contractor Sri. Satish Sahni.

11. The contractor retained only 22 contract workers for running the canteen under the new arrangement, under which the food items were required to be sold at market rates instead of subsidized rates.

12. On 25.11.2000 itself, HAL issued notices to the employees of the canteen contractor whose services had been terminated and stating that as the contractor did not fulfill his obligations, salary of the employees for the period 01.11.2000 to 25.11.2000, one month's salary in lieu of the notice, retrenchment allowance, gratuity and other dues were paid to the workmen along with the notice. However, the employees declined to receive the notices and the amounts.

13. HAL issued letters dated 25.11.2000 to the 63 canteen employees, whose services had been terminated, stating that they were being deployed on casual basis to perform other duties in the HAL and they were directed to report in the technical training center at 09:00 a.m. on 27.11.2000.

14. The employees sent similarly worded replies to the aforesaid letter, stating that the order for their redeployment was illegal, as they were regular employees of HAL and not of the contractor.

15. Hindustan Aeronautics Karmchari Sabha (HAKS) opposed the grant of canteen allowance alleging that it was a plan to close the canteen and it submitted a representation dated 23.11.2000 to this effect.

16. On 09.12.2000, HAL issued letters to all the concerned employees stating that the subsidised canteen was being restored as earlier and the employees should contact the canteen contractor and start working in the canteen. However, on the same date,

the canteen contactor sent a letter stating that the office bearers of workers union had obstructed the working of the canteen, had turned all the persons out of the canteen and had locked up its door. The lock was opened on 11:45 hours but the canteen contactor and his employees were not permitted to enter the canteen. Hindustan Aeronautics Employees Association (HAEA) gave a letter dated 09.12.2000 demanding resumption of canteen allowance.

17. On 08/09.12.2000, a Manager of HAL submitted a shift report stating that some employees had tried to enter the factory premises at about 01:45 a.m. on 09.12.2000. The gate was locked and they were not allowed to enter the premises. They wanted to search one Sri R.P. Singh, who had reportedly scaled over the boundary wall of the administrative building carrying patrol in a jerry can in order to commit self immolation. Thereupon, search parties were sent all around the factory and Sri R.P. Singh was found out. He was under influence of liquor and was upset. He was sent home around 04:15 a.m. with security.

18. HAKS boycotted the canteen and demanded restoration of canteen allowance and at the same time, insisted that the persons employed by the canteen contractor should not be retrenched.

19. On 23.12.2000, the canteen contractor issued a notice stating that the contract between him and HAL had come to an end and the services of all the persons working in the canteen also stood terminated. Dues of the employees were being paid by HAL.

20. On 23.12.2000, HAL sent letters to the canteen workers stating that the period of canteen contract expired on 23.12.2000 and the services of the canteen workers stood terminated. Arrears of salary, one month's salary in lieu of notice, retrenchment allowance, gratuity and other dues were paid to the employees along with this notice. This information was sent to the Government of India also through a letter dated 23.12.2000.

21. Some employees challenged the retrenchment notice by filing Writ Petition No. 122 (S/S) of 2001, in which an interim order dated 10.01.2001 was passed staying operation of the retrenchment notice. However, the writ petition was dismissed by means of a judgment and order dated 30.10.2001 on the ground of availability of alternative remedy under the Industrial Disputes Act. Thereafter HAKS gave an application to the Deputy Labour Commissioner challenging termination of services of canteen employees, which resulted in a reference being made by the State Government vide order dated 23.03.2003.

22. The reference was decided by the Industrial Tribunal II, U.P., Lucknow by means of the impugned award dated 09.08.2011 passed by the Presiding Officer, Industrial Tribunal (II), U.P., Lucknow in Award Case No. 52 of 2023, which has been published on 20.10.2011. The Tribunal has held that the canteen employees had sought parity in wages with the wages payable to unskilled workmen of HAL, which was accepted by the deputy Labour Commissioner, Kanpur and the challenge to the aforesaid order made by HAL remained unsuccessful up to the Hon'ble Supreme Court. The contract between HAL and the contractor contained provisions beneficial to the workmen and it also provided that in case the canteen

contractor fails to make any payment to the workmen, HAL will pay the amount to them and will recover the same from the contractor. The contract also provided that the contractor shall pay increments in wages to the workmen in furtherance of Government Orders and orders of Deputy Labour Commissioner and HAL will reimburse the contractor. The Tribunal concluded that all the aforesaid facts establish that in fact the 66 canteen workers, regarding whom the reference was made, were the employees of the principal employer – HAL and the contract between HAL and the canteen contractor was merely a paper agreement and it was sham. The Tribunal declared the retrenchment orders dated 25.11.2000 passed in respect of 4 workmen and the retrenchment orders dated 23.12.2000 passed in respect of rest of them to be illegal.

23. The Tribunal further directed HAL to pass appropriate orders regarding regularization of services of the workmen within three months from the publication of the award. However, the Tribunal rejected the claim of payment of back wages on the ground that there was no pleading that the workmen remained unemployed during the relevant period.

24. Submissions of Sri P.K. Sinha, the learned Counsel for HAL and Sri Dhruv Mathur and Sri Pranav Agarwal, the learned counsel for HAKS, were heard on various dates from 18.04.2024 till 06.05.2024 and the judgment was reserved. The learned Counsel for HAL had filed detailed written submissions before commencement of oral submissions. The learned Counsel for HAKS has filed a written brief of his submissions in the month of October 2024.

25. Notices of both the Writ Petitions were issued to the canteen contractor Sri. Satish Sahni. The office has put up a report in Writ C No. 1000491 of 2012 that the notice was served, but he has not put in appearance before this Court.

26. Sri P. K. Sinha, the learned counsel for HAL submitted that the reference order wrongly mentions HAL to be the employer of the canteen workers. In fact HAL is the principal employer of the workmen of the canteen whereas their employer is the canteen contractor. HAL is authorised to engage contract workers vide Notification dated 04.03.1991 and it is registered under the Contract Labour Act. He further submitted that HAL cannot be treated as both an employer and a principal employer in view of the judgment in the case of **Steel Authority of India Ltd. Vs. Union of India**: (2006) 12 SCC 233.

27. The learned counsel for HAL has secondly submitted that after the judgment in **Steel Authority of India Ltd.** (Supra), it has been declared that the appropriate government for HAL is the Central Government. It is further submitted by him that the Hon'ble Supreme Court in the case of **ITC Limited & Others vs. State of Karnataka & Others:** (1995) Supp SCC 476**,** has held that *"once the Centre takes over an industry under Entry 52 of List I and passes an Act to regulate the legislation, the State Legislature ceases to have any jurisdiction to legislate in that field and if it does so, that legislation would be ultra vires the powers of the State Legislature."*

28. Further, placing reliance on the judgment of the Apex Court in **Bangalore Water Supply vs. A Rajappa & Others:** (1978) 2 SCC 213, Sri. Sinha has submitted that the employees and management of manufacturing process are also covered

under the term industry and thus will also be under control of the Central Government and the State Government will have no control at all since HAL is a "controlled industry".

29. The third submission of the learned counsel for HAL is that under U. P. Industrial Disputes Act (hereinafter referred to as 'the State Act'), the industrial disputes of the workmen and the employer regarding any industry carried on by or under authority of the Central Government or by a Railway Company or such controlled industry as may be specified in this behalf by the Central Government, are excluded from the purview of consideration of industrial disputes by the Industrial Tribunal created under Section 4-B of the State Act. As such, the industrial disputes in regard to the workmen of an industry specified as a 'controlled industry' under Schedule I of Industries (Development and Regulation) Act, 1951 and Section 2 (ee) of Industrial Disputes Act, 1947, cannot be adjudicated by a Tribunal created under Section 4-B of the State Act, 1947 until and unless a specific amendment is made in the State Act empowering the Tribunals to adjudicate the industrial disputes of industries carried on by or under authority of the Central Government and the reference to the U.P. Industrial Tribunal was incompetent.

30. The learned counsel for HAL has further submitted that the appropriate government can refer the industrial disputes by exercise of power under Section 10(1)(d) or under the third Proviso appended to Section 10(1)(d). The consequence of exercising power under both the provisions is altogether different. Under Section 10(1)(d) the industrial disputes have to be referred necessarily to Central Government Industrial Tribunal (CGIT) constituted under Section 7-A of the Central Act for the reason that word 'Tribunal' as mentioned in Section 10(1)(d) refers to the Tribunals constituted under Section 7-A of the Central Act. On the other hand, once the appropriate government elects to exercise power under the third Proviso appended to Section 10(1)(d), the 'Tribunal' defined in third proviso is a 'Tribunal' constituted by the State Government which is altogether a different Tribunal manned by different Presiding Officer (P.O.) appointed by the State Government. As such, the reference of U.P. Industrial Tribunal is bad.

31. Relying upon the decisions in the cases of **Bhavnagar University versus Palitana Sugar Mill Pvt. Ltd. &Ors:** (2003) 2 SCC 111 and **J. N. Ganatra versus Morvi Municipality:** (1996) 9 SCC 495, the learned Counsel for HAL has submitted that once the authority chooses to exercise power under any specific provision, the power should be exercised in the manner as provided in the statute and in no other manner.

32. Fifthly, the learned counsel has submitted that the terms of reference order on its close reading clearly reveal that it has taken away HAL's status of 'Principal Employer' under The Contract Labour Act, 1970 and the Rules framed there under without giving an opportunity to HAL to challenge the change of its status from 'Principal Employer' to 'Employer' and, as such, the reference is illegal and liable to be set aside. Further, the Hon'ble Supreme Court in **Steel Authority of India Ltd.** (Supra) has held that the Contract Labour Act, 1970 is a complete Code in itself and the relationship between the employer and employees is essentially a question of fact,

determination of which is under the exclusive domain of the appropriate government and not the labour court or the writ court. The Hon'ble Supreme Court has held that if a relief of absorption is claimed, the workman shall necessarily approach the Industrial Tribunal and establish that contract is sham, ruse & camouflage. Thus, for adjudicating upon the issue regarding the validity of contract whether the same is sham or not, a reference has to be necessarily drawn by the appropriate government for referring the matter for adjudication under Section 10(1) (d) of the Central Act which has not been done in the case at hand.

33. Sri. Sinha has submitted that the adjudication of the contract between HAL and the canteen contractor being sham has been made by the Tribunal without any reference and it is in violation of law laid down by the Hon'ble Supreme Court in **TISCO Limited vs. State of Jharkhand: (2014) 1 SCC 536** wherein the Apex Court held that the Tribunal acquires jurisdiction only on the basis of a reference made to it and the Tribunal has to confine itself within the subject matter of reference.

34. The learned Counsel for HAL has also submitted that no fresh notice was issued after changing the reference from Section 4(k) of the State Act to Section 10(1)(d) of the Central Act, rather proceedings were continued in pursuance of the Notice issued under Section 4(k) of the State Act which culminated into the Award and thus the entire adjudication of Reference under Section 10(1)(d) of the Central Act is illegal and without jurisdiction. He has submitted that even if the power under Section 39 of Central Act has been delegated to be exercised by the Government of U.P., after **Air India Statutory Corpn. v. United Labour Union**: (1997) 9 SCC 377, a notice under Section 10(1)(d) of the Central Act ought to have been issued for conducting the proceedings of adjudication under the Central Act.

35. The learned counsel for HAL has also contended that the impugned Award arbitrarily creates difference between the appropriate governments before and after the year 1986 when the amendment in the definition of appropriate government under the Contract Labour Act was made. He has submitted that so far as HAL is concerned, the Central Government has always been the 'appropriate government' before or even after the said amendment in the definition of appropriate government in the Contract Labour Act. He has placed reliance on the judgment of the Hon'ble Supreme Court in Civil Appeal No. 3639 of 2002 where it has categorically been held that HAL is an undertaking of Central Government and it is only the Central Government which exercises control over the same.

36. Learned counsel for HAL has invited this Court's attention to sub-para-VI of the contract where although it is written that the contractor will be the employer of the workers working in the canteen yet in the same para, it has also been written that until the contractor files its own standing order, the standing orders of HAL shall apply to the contract workmen and the contractor will have to work in accordance with the Model Standing Order. He has submitted that the Model Standing Order as mentioned in Clause-VI of the contract, meant the model standing order under Standing Order 1946 and not the company's certified standing order. He has submitted that the finding of

the Tribunal that the Contract Labours were in fact employees of petitioner and contractor was only a device to avoid statutory liabilities, is wrong.

37. The next contention on behalf of learned counsel for HAL is that the provision of payment of Employees Provident Fund (EPF) under Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as EPF Act, 1952) and Employees' State Insurance Act, 1948 (hereinafter referred to as ESI Act, 1948) has been included in terms of the contract since it is a statutory requirement in terms of Section 21 of the Contract Labour Act. Under this Section, it is responsibility of the 'principal employer' to ensure that the workmen are being afforded all the benefits of the statutory enactments. Where the contractor does not pay his workmen in compliance with the provision of Section 21(4) of the Contract Labour Act, it becomes the responsibility of the principal employer to pay the same to the contract workmen and thereafter deduct the same amount from the bills of the contractor. Such payment made by the principal employer to the contract workmen does not create any relationship of employer and employee between the HAL and the contract workmen. In regard to the filing of P.F. and E.S.I. in HAL Code, the learned Counsel for HAL has submitted that the P.F. and E.S.I. were being deposited by the contractor and HAL only used to countersign the deposit vouchers to ensure that the contractor was making the statutory deposits in respect of the Contract Labours under Section 21(4) of the Contract Labour Act. Such deposition does not establish any relationship of master and servant between the parties.

38. In regard to the finding of the Tribunal pertaining to engagement of the workmen by a new contractor after every term of contract comes to an end by giving them new appointment letters, the learned counsel for HAL has submitted that the appointment letters were issued by the canteen contractor without any involvement of HAL.

39. In regard to the finding recorded by the Industrial Tribunal that every workman ought to have been given retrenchment compensation, the learned counsel has submitted that the obligation was of the contractor and not of HAL. The contract workmen of the erstwhile contractors never raised any claim for retrenchment compensation & gratuity from the outgoing contractor. However, when the subsidized canteen was abolished and the contractor requested HAL to pay his entire liability, HAL discharged the said liability on behalf of the contractor by using the 'retention money' of the erstwhile contractors. HAL has not paid the amount as employer of the contract employees and it has discharged the obligation as the principal employer. In the retrenchment notice it had been specifically averred that HAL was making such payments because the contractor had not discharged its obligations.

40. The learned Counsel for HAL has submitted that after substitution of subsidized canteen by a market rate canteen, the canteen business was reduced drastically and the canteen contractor decided to retain only 22 employees. HAL offered employed to the remaining canteen employees on compassionate basis, but this offer was not accepted by those employees. The offer of redeployment cannot be treated as creating the relationship of master and servant between HAL and the canteen employees.

41. The learned counsel for HAL has submitted that HAL did not make payment of wages to the canteen employees. As per the terms of the contract, HAL used to pay subsidy amount against the bills of the contractor. The determination made in Award passed by the U.P. Labour Commissioner under Rule 25(2) (5) (b) of the Contract Labour Rules, 1975 is only a computation of what wages had to be paid to the Contract Labours. In the aforementioned award the contractor was also a party and HAL was made party as a 'Principal Employer'. This was done so that in case of failure of the contractor to pay such wages, liability to pay the same may be fastened on to HAL under Section 21 of The Contract Labour Act, 1970. Therefore, in accordance with the award, the contractor had to pay the wages to his labours which has to be ensured under Section 21(4) of the Contract Labour Act by HAL and thus, the said determination of U.P. Labour Commissioner in the award passed by him does in no manner create relationship of master and servant between HAL and the canteen employees.

42. The learned counsel for HAL has further submitted that the new contractor often engaged the employees of old contractor who were well acquainted with their work, but this was in the contractor's discretion and HAL had never directed the contractor to engage any specific workmen of the erstwhile contractor.

43. Relying upon the judgment in the case of **Indian Petrochemicals Corpn. Ltd. v. Shramik Sena**: (1999) 6 SCC 439 and **Balvant Rai Saluja vs. Air India:** (2014) 9 SCC 407, the learned Counsel for HAL has submitted that the contract workmen of the statutory canteen are entitled to get benefit under Factories Act only and not for all other purpose under Industrial Disputes Act. The Contract Labours working in statutory canteen have to be treated only as employees of the canteen and would get benefits under Factories Act, 1948 only so long as the canteen is in operation but when the canteen was changed from a subsidized canteen to market rate canteen and the work-load was been reduced significantly, retrenchment of the canteen employees was the only viable option left for the canteen contractor and HAL has only paid dues to them on the instructions in writing given by the contractor.

44. The learned counsel for HAL has further submitted that the management was made to change the system of subsidized canteen to market rate canteen in view of the pressing demand of the employees of HAL and as a consequence thereto, a tripartite settlement was arrived at in which in place of subsidized canteen, the management agreed to pay 'Canteen Allowance' to the members of HAEA and to run the canteen at market rates. The said settlement was made by accepting the long standing demands of HAEA, as it was apprehended that if the demand was not accepted, industrial unrest could have escalated.

45. Per contra, Sri Dhruv Mathur, the learned counsel for the respondent - Hindustan Aeronautics Karmchari Sabha (HAKS), has submitted that the State Industrial Tribunal has jurisdiction to adjudicate on the dispute in question since the third proviso to Section 10 of the Central Act provides that *"where the dispute in relation to which the Central Government is the appropriate Government, it shall be competent for that Government to refer the dispute to a*

*Labour Court or an Industrial Tribunal, as the case may be, constituted by the State Government".* The dispute in question was referred to Industrial Tribunal constituted by the State Government in exercise of discretion vested in the Government by the third Proviso to Section 10 of the Central Act.

46. Learned Counsel for HAKS further submitted that even otherwise, the Industrial Tribunal that has passed the impugned award has been constituted by the State Govt. under Section 7-A of the Industrial Disputes Act, 1947 (the Central Act), as is evident from the information received from the office of the Industrial Tribunal, Lucknow under the Right to Information Act, 2005. In this regard, he has placed reliance on a judgment dated 01.04.2024 passed by a coordinate bench of this Court in Writ C No. 1002796/2003 and connected Writ C No. 1001632/2015 titled **Hindustan Aeronautics Ltd. Versus State of U. P. & Others,** in which this Court has held that all Tribunals constituted by the State Govt., including the Tribunal in question, are functioning in terms of Section 7-A of the Central Act. In view of the aforesaid law, the submission of HAL that the reference of the industrial dispute in question could not have been made to a Tribunal constituted by the State Government, is misconceived and deserves to be rejected.

47. The learned counsel for HAKS further submitted that where the Central Government is the appropriate government, Section 39 of the Central Act empowers it to delegate its powers to the State Government. In exercise of this power, the Central Government has delegated its powers to the State Governments vide Notification dated 03.07.1998 in relation to the undertakings, cooperation autonomous bodies running under the Central Government which were specified in the Schedule annexed with the Notification dated 03.07.1998. In the schedule of the said Notification the name of HAL is placed at serial no.40. Therefore, the State Government is exercising such delegated power in respect of HAL and accordingly, it has made the reference under Section 10(1)(d) of the Industrial Disputes Act 1947 to the Industrial Tribunal constituted by it.

48. The next submission made by the learned counsel for HAKS is that the mention of Section 4 (k) in the notice dated 08.08.2003 is merely a typographical error as the said notice also clearly mentions that it has been issued in furtherance of Letter No. 849-54 which clearly indicates that the proceedings were initiated in furtherance of Section 10 of the Central Act.

49. Sri. Dhruv Mathur has submitted that in view of the law laid down by the Hon'ble Supreme Court in **Gujarat Electricity Board v/s Hind Mazdoor Sabha**:(1995) 5 SCC 27, in which it was held that where an Industrial Establishment seeks the protection of being registered under the Contract Labour Act for engaging labour through contractors, it shall be open for the Industrial Adjudicator to first inquire as to whether the arrangement with the contractor is sham or not and once the adjudicator comes to the conclusion that the arrangement between the Industrial Establishment and the Contractor is sham, it shall have the jurisdiction to adjudicate on the correctness of the retrenchment of the workmen.

50. The Learned Counsel for HAKS further submitted that as per the General

Clauses Act, any amendment being brought about must also follow the same procedure which was followed while making the original decision or order. The decision dated 09.01.2001 exempting certain establishments from the prohibition of engaging contract labour, was made after due consultation with the State Contract Labour Board as provided under Section 10 (1) of the Contract Labour Act. HAL was added to the said list by making amendment to the list without consultation with U.P. State Contract Labour Advisory Board. Therefore, the exemption granted to HAL is bad in law.

51. Lastly, the learned counsel for HAKS submits that HAL is an 'Industrial Establishment' as defined under Section 25-L(a) of the Central Act and is governed by the provisions of Chapter V-B (Sections 25-K to 25-S) of the Central Act. Section 25-N which is a part of Chapter V-B provides that a prior permission of the appropriate government has to be obtained by an industrial establishment to which the said chapter applies, prior to retrenching workmen employed in it. The said permission had neither been sought nor granted to HAL and on this count alone, the retrenchment of the workmen in question is bad as the same has not been made in accordance with law.

52. In respect to the question of back wages of the workers, Sri. Dhruv Mathur has placed reliance on the judgment rendered by the Hon'ble Supreme Court in the case of **Deepali Gundu Surwase Versus Kranti Junior Adhyapak Mahavidyalaya (D.ED.) & Others:** (2013) 10 SCC 324 wherein it has been held that the employee who is desirous of getting back wages is required to plead or at least make a statement before the Adjudicating Authority that he/she was not gainfully employed or was employed on lesser wages. The burden then shifts on the employer to lead cogent evidence to prove that the said employee was employed somewhere else and was getting wages equal to the wages he/she was drawing prior to the termination of service. In the present case, all the retrenched workmen were not gainfully employed and were unemployed and since HAL had failed to establish that they were gainfully employed, they are entitled to full back wages from the date of their respective retrenchment orders dated till the date of their reinstatement in service.

53. The following questions arise for consideration of this Court from the submissions of the learned Counsel for the parties as well as from a perusal of the record of the case: -

A. Which Government is the 'appropriate Government' in respect of HAL?

B. Whether the State Government was competent to refer the dispute between the parties for adjudication to the Tribunal?

C. Whether the State Government could have referred the dispute to an Industrial Tribunal constituted under Section 4-B of the U. P. Industrial Disputes Act or the dispute ought to have been referred to a Tribunal constituted under Section 7-A of the Industrial Disputes Act (Central)?

D. Whether the question regarding the contract between HAL and the canteen operator being sham or not, was included in the scope of reference? If not, its effect.

E. Whether the Industrial Tribunal has jurisdiction to examine the plea of the contract between HAL and the canteen contractor being sham or void?

F. Whether the finding recorded by the Tribunal that the contract between

HAL and the canteen operator was sham, is sustainable in law?

G. Whether the concerned employees are entitled for reinstatement, regularization of services and payment of back-wages?

H. Whether the impugned award is sustainable in law?

**Analysis**

**Question A - Which Government is the 'appropriate Government' in respect of HAL?**

54. Section 2 of the Contract Labour Act provides as follows: -

*__2. Definitions.__—(1) In this Act, unless the context otherwise requires,—*

*(a) "appropriate Government" means,—*

*(i) in relation to an establishment in respect of which the appropriate Government under the Industrial Disputes Act, 1947 (14 of 1947), is the Central Government, the Central Government;*

*(ii) in relation to any other establishment, the Government of the State in which that other establishment is situate;*

55. Section 2(a) of the Industrial Disputes Act, 1947 (the Central Act) defines the'appropriate Government' under Section 2(a)(i) as follows:

*"(a) "appropriate Government" means,—*

***in relation to any Industrial Disputes** concerning any industry carried on by or under the authority of the Central Government or by a railway company or **concerning any such controlled industry as may be specified in this behalf by the Central Government** or in relation to an Industrial Dispute concerning a Dock Labour Board established under Section 5-A of the Dock Workers (Regulation of Employment) Act, 1948 (9 of 1948), or the Industrial Finance Corporation of India Limited formed and registered under the Companies Act, 1956, or the Employees' State Insurance Corporation established under Section 3 of the Employees' State Insurance Act, 1948 (34 of 1948), or the Board of Trustees constituted under Section 3-A of the Coal Mines Provident Fund and Miscellaneous Provisions Act, 1948 (46 of 1948), or the Central Board of Trustees and the State Boards of Trustees constituted under Section 5-A and Section 5-B, respectively, of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 (19 of 1952), or the Life Insurance Corporation of India established under Section 3 of the Life Insurance Corporation Act, 1956 (31 of 1956), or the Oil and Natural Gas Corporation Limited registered under the Companies Act, 1956 (1 of 1956)] or the Deposit Insurance and Credit Guarantee Corporation established under Section 3 of the Deposit Insurance and Credit Guarantee Corporation Act, 1961 (47 of 1961), or the Central Warehousing Corporation established under Section 3 of the Warehousing Corporations Act, 1962 (58 of 1962), or the Unit Trust of India established under Section 3 of the Unit Trust of India Act, 1963 (52 of 1963), or the Food Corporation of India established under Section 3, or a Board of Management established for two or more contiguous States under Section 16 of the Food Corporations Act, 1964 (37 of 1964), or the Airports Authority of India constituted under Section 3 of the Airports Authority of India Act, 1994 (55 of 1994), or a Regional Rural Bank established under Section 3 of the Regional Rural*

*Banks Act, 1976 (21 of 1976), or the Export Credit and Guarantee Corporation Limited or the Industrial Reconstruction Corporation of India Limited, or the Banking Service Commission established, under Section 3 of the Banking Service Commission Act, 1975, or an air transport service, or a banking or an insurance company, a mine, an oilfield, a Cantonment Board, or a major port,* ***any company in which not less than fifty-one per cent of the paid-up share capital is held by the Central Government****, or any corporation, not being a corporation referred to in this clause, established by or under any law made by Parliament, or the Central public sector undertaking, subsidiary companies set up by the principal undertaking and autonomous bodies owned or controlled by the Central Government,* ***the Central Government,"***

(Emphasis added)

56. Sri. Sinha has also submitted that HAL is a 'controlled industry' under Schedule I of Industries (Development and Regulation) Act, 1951. Industries (Development and Regulation) Act, 1951 (Act 65 of 1951) (which will hereinafter be referred to as IDR Act), is *"An Act to provide for the development and regulation of certain industries"* and it was enacted with effect from 31.10.1951. The statement of objects and reasons of the aforesaid Act reads as follows:

***"Statement of Objects and Reasons****.—The object of this Bill is to provide the Central Government with the means of implementing their industrial policy which was announced in their Resolution No. I(3)-44(13)-48, dated 6th April, 1948, and approved by the Central Legislature.* ***The Bill brings under Central control the development and regulation of a number of important industries, the activities of which affect the country as a whole and the development of which must be governed by economic factors of all-India import****. The planning of future development on sound and balanced lines is sought to be secured by the licensing of all new undertakings by the Central Government. The Bill confers on Government, power to make rules for the registration of existing undertakings, for regulating the production and development of the industries in the Schedule and for consultation with Provincial Government on these matters. Provision has also been made for the constitution of a Central Advisory Council, prior consultation with which will be obligatory before the Central Government takes certain measures such as the revocation of a licence or taking over the control and management of any industrial concern.*

(Emphasis added)

57. Section 2 of the IDR Act provides that:-

***2. Declaration as to expediency of control by the Union****.—It is hereby declared that it is expedient in the public interest that the Union should take under its control the industries specified in the First Schedule.*

58. Article 7 (1) of the First Schedule referred to in Section 2 of the IDR Act mentions "Any industry engaged in the manufacture or production of any of the articles mentioned in each of the following headings or sub-headings, namely: - Transportation: Aircraft.

59. Chapter III of IDR Act deals with Regulation of Scheduled Industries and Section 10 of the Act falling in this Chapter

provides for Registration of existing industrial undertakings. The learned Counsel for the petitioner has submitted that HAL has been registered under Section 10 of IDR Act, but no document has been brought on record which may substantiate this submission.

60. Assuming that HAL has been registered under Section 10 of the IDR Act, it will not imply that it becomes a controlled industry specified in behalf of the Industrial Disputes Act by the Central Government

61. Chapter III-AB of IDR Act contains provisions to provide relief to certain industrial undertakings and Section 18-FB falling in the aforesaid Chapter of the IDR Act provides as follows: -

***"18-FB. Power of Central Government to make certain declarations in relation to industrial undertakings, the management or control of which has been taken over under Section 18-A, Section 18-AA or Section 18-FA.***—*(1) The Central Government, if it is satisfied, in relation to an industrial undertaking or any part thereof, the management or control of which has been taken over under Section 18-A, whether before or after the commencement of the Industries (Development and Regulation) Amendment Act, 1971, or under Section 18-AA or Section 18-FA, that it is necessary so to do in the interests of the general public with a view to preventing fall in the volume of production of any scheduled industry, it may, by notified order, declare that—*

*(a) all or any of the enactments specified in the Third Schedule shall not apply or shall apply with such adaptations, whether by way of modification, addition or omission (which does not, however, affect the policy of the said enactments) to such industrial undertaking, as may be specified in such notified order, or*

*(b) the operation of all or any of the contracts, assurances of property, agreements, settlement, awards, standing orders or other instruments in force (to which such industrial undertaking or the company owning such undertaking is a party or which may be applicable to such industrial undertaking or company) immediately before the date of issue of such notified order shall remain suspended or that all or any of the rights, privileges, obligations and liabilities accruing or arising thereunder before the said date, shall remain suspended or shall be enforceable with such adaptations and in such manner as may be specified in the notified order.*

*(2) The notified order made under sub-section (1) shall remain in force, in the first instance, for a period of one year, but the duration of such notified order may be extended from time to time by a further notified order by a period not exceeding one year at a time:*

*Provided that no such notified order shall, in any case, remain in force—*

*(a) after the expiry of the period for which the management of the industrial undertaking was taken over under Section 18-A, Section 18-AA or Section 18-FA, or*

*(b) for more than eight years in the aggregate from the date of issue of the first notified order,*

*whichever is earlier.*

*(3) Any notified order made under sub-section (1) shall have effect notwithstanding anything to the contrary contained in any other law, agreement or instrument or any decree or order of a court, tribunal, officer or other authority or of any submission, settlement or standing order.*

*(4) Any remedy for the enforcement of any right, privilege, obligation or liability referred to in clause (b) of sub-section (1) and suspended or modified by a notified order made under that sub-section shall, in accordance with the terms of the notified order, remain suspended or modified, and all proceedings relating thereto pending before any court, tribunal, officer or other authority shall accordingly remain stayed or be continued subject to such adaptations, so, however, that on the notified order ceasing to have effect—*

*(a) any right, privilege, obligation, or liability so remaining suspended or modified shall become revived and enforceable as if the notified order had never been made;*

*(b) any proceeding so remaining stayed shall be proceeded with, subject to the provisions of any law which may then be in force, from the stage which had been reached when the proceedings became stayed.*

*(5) In computing the period of limitation for the enforcement of any right, privilege, obligation or liability referred to in clause (b) of sub-section (1), the period during which it or the remedy for the enforcement thereof remained suspended shall be excluded."*

62. The Third Schedule referred to in Section 18-FB(1)(a) of IDR Act includes the Industrial Disputes Act also. However, neither there is anything on record to establish that any Notification has been issued under the aforesaid provision, nor would any such Notification remain in force for a period beyond eight years as per the provision contained in Section 18-FB(2). Therefore, the mere registration of HAL under Section 10 of the IDR Act would not make it a controlled industry as per the definition of the expression given in the Industrial Disputes Act and it will not affect the applicability of the Industrial Disputes Act on HAL.

63. Thus the submission of the learned Counsel for HAL that HAL is a controlled industry, cannot be accepted as there is nothing on record to establish that HAL is a controlled industry specified in this behalf by the Central Government.

64. The learned Counsel for HAL has relied upon a judgment of the Hon'ble Supreme Court in **Hindustan Aeronautics Ltd. v. Hindustan Aeronautical Canteen Kamgar Sangh**: (2007) 15 SCC 51, wherein a two Judge Bench of the Hon'ble Supreme Court held that it is undisputed that Hindustan Aeronautics Ltd. is an undertaking of the Central Government and it is the Central Government which exercises full control over the same and, therefore, the Central Government is the "appropriate government". The learned Counsel for HAKS has not advanced any submission in reply to this submission.

65. However, **Hindustan Aeronautics Ltd. v. Hindustan Aeronautical Canteen Kamgar Sangh:** (2007) 15 SCC 51 was decided without taking into consideration the fact that in an earlier three Judge Bench decision in the case **of Hindustan Aeronautics Ltd. v. Workmen: (1975) 4 SCC 679,** it was held that the appropriate Government in respect of HAL was the State Government. It was contended that the Central Government owned the entire bundle of shares in the company. It appoints and removes the Board of Directors as well as the Chairman and the Managing Director. All matters of importance are reserved for the decision of the President of India and ultimately

executed in accordance with his directions. The memorandum and articles of association of the company unmistakably point out the vital role and control of the Central Government in the matter of carrying on of the industry owned by the appellant. Hence the industrial dispute in question concerned an industry which was carried on "under the authority of the Central Government" within the meaning of Section 2(a)(i) of the Act and the Central Government was the only appropriate Government to make the reference under Section 10. The Hon'ble Supreme Court held that the submission so made was identical to the one made before and repelled by the Supreme Court in the case of **Heavy Engineering Mazdoor Union v. State of Bihar:** (1969) 1 SCC 765 wherein it was said that: -

*"It is true that besides the Central Government having contributed the entire share capital, extensive powers are conferred on it, including the power to give directions as to how the company should function, the power to appoint directors and even the power to determine the wages and salaries payable by the company to its employees. But these powers are derived from the company's memorandum of association and the articles of association and not by reason of the company being the agent of the Central Government. The question whether a corporation is an agent of the State must depend on the facts of each case. Where a statute setting up a corporation so provides, such a corporation can easily be identified as the agent of the State as in Graham v. Public Works Commissioners [(1901) 2 KB 781] where Phillimore, J. said that the Crown does in certain cases establish with the consent of Parliament certain officials or bodies who are to be treated as agents of the Crown even though they have the power of contracting as principals. In the absence of statutory provision, however, a commercial corporation acting on its own behalf, even though it is controlled wholly or partially by a government department, will be ordinarily presumed not to be a servant or agent of the State. The fact that a minister appoints the members or directors of a corporation and he is entitled to call for information, to give directions which are binding on the directors and to supervise over the conduct of the business of the corporation does not render the corporation an agent of the Government, (see State Trading Corporation of India Ltd. v. Commercial Tax Officer, Visakhapatnam [AIR 1963 SC 1811 Per Shah, J.] and Tamlin v. Hannaford [(1950) 1 KB 18, 25, 26] ). Such an inference that the corporation is the agent of the Government may be drawn where it is performing in substance governmental and not commercial functions. (cf. London County Territorial and Auxiliary Forces Association v. Nichols [(1948) 2 All ER 432])."*

66. In **Hindustan Aeronautics Ltd. v. Hindustan Aeronautical Canteen Kamgar Sangh:** (2007) 15 SCC 51 relied upon by Sri. P. K. Sinha, the question whether in respect of HAL, the State Government is the "appropriate Government" under the provisions of the Contract Labour Act, was put up for consideration of a two Judge Bench of the Hon'ble Supreme Court. The Hon'ble Supreme Court relied upon a Constitution Bench judgment in the case of **SAIL v. National Union Waterfront Workers:** (2001) 7 SCC 1, in which it was held that the "appropriate government" will be the government which exercises control and authority over the organisation

concerned. A Notification under Section 10(1) of the Contract Labour Act prohibiting employment of contract labour in any process, operation or other work in any establishment has to be issued by the appropriate Government. The Hon'ble Supreme Court held that it is undisputed that Hindustan Aeronautics Ltd. is an undertaking of the Central Government and it is the Central Government which exercises full control over the same and, therefore, the Central Government is the "appropriate government". However, the Hon'ble Supreme Court did not take into consideration the earlier three Judge Bench judgment in the case of **Hindustan Aeronautics Ltd. v. Workmen:** (1975) 4 SCC 679.

67. Again, in **Nashik Workers Union v. Hindustan Aeronautics Ltd.**, (2016) 6 SCC 224, the question as to which Government is the 'appropriate Government' in respect of HAL, was decided by a two Judge Bench of the Hon'ble Supreme Court as follows: -

*"32. In the case at hand, the issue which arises for consideration is whether the decision in HAL 2 [Hindustan Aeronautics Ltd. v. Hindustan Aeronautical Canteen Kamgar Sangh, (2007) 15 SCC 51] can be regarded as a binding precedent. As is noticeable, HAL 2 has not taken note of the earlier decision in HAL 1 [Hindustan Aeronautics Ltd. v. Workmen, (1975) 4 SCC 679]. It has been clearly held in HAL 1 that regard being had to the dictionary clause of the ID Act for the purpose of Hindustan Aeronautics Ltd., it is the State Government which has to make the reference. In HAL 2 the Court has referred to the decision in SAIL case [SAIL v. National Union Waterfront Workers, (2001) 7 SCC 1] and opined that it is undisputed that Hindustan Aeronautics Ltd. is an undertaking of the Central Government and it is the Central Government which exercises full control over the same and, therefore, the appropriate Government is the Central Government. This analysis runs counter to HAL 1 and as well the ratio of the decision in SAIL case. On the contrary there is no discussion either on the facts or the law. It has been opined that the facts are "undisputed".*

*33. In HAL 1, the three-Judge Bench had referred to the decision in Heavy Engg. Mazdoor Union [Heavy Engg. Mazdoor Union v. State of Bihar, (1969) 1 SCC 765]. As has been held in Tata Memorial Hospital Workers Union [Tata Memorial Hospital Workers Union v. Tata Memorial Centre, (2010) 8 SCC 480], the authority in Heavy Engg. Mazdoor Union has been approved in SAIL with some divergence. The authority in SAIL case, as the conclusion would show, covers two situations — the unamended provision and the amended provision. It does not disturb the principles stated in HAL 1. Thus, two aspects, first, HAL 2 does not take note of HAL 1 and second, it proceeds on the basis of undisputed facts which are not stated. It is to be noted that there is nothing in the order in HAL 2 to suggest that Hindustan Aeronautics Ltd. is an agent of the Central Government.*

***34. In our considered opinion, as HAL 2 has not noticed HAL 1 which has been approved in SAIL case, it cannot be considered as a binding precedent. Therefore, we hold that HAL 1 still holds good and lays down the correct law and we are bound by it*** *as its foundation flows from Heavy Engg. Mazdoor Union which has been approved in SAIL with some divergence as has been stated in Tata*

*Memorial Hospital Workers Union. Be it stated, that divergence really does not affect the approval.* ***We have no hesitation in our mind that HAL 2 cannot be regarded as a binding precedent….”***

(Emphasis added)

68. Thus the judgment in the case of **Hindustan Aeronautics Ltd. v. Hindustan Aeronautical Canteen Kamgar Sangh:** (2007) 15 SCC 51 cited by Sri. P. K. Sinha has been held by the Hon’ble Supreme Court not to be a binding precedent, in a case in which HAL was a party, and the Hon’ble Supreme Court held that appropriate Government in respect of HAL is the State Government.

69. In the judgment dated 01.04.2024 passed in Writ C No. 1002796 of 2003 and Writ C No. 1001632 of 2015 titled **Hindustan Aeronautics Ltd. versus State of U.P.** a coordinate Bench of this Court has held that: -

*“when the provisions of the Act, 1947 are seen in the context of the Notification dated 03.07.1998, it is clearly apparent that the State Government could have referred the industrial dispute to a Tribunal for adjudication which in effect has been done by means of reference order dated 13.06.2002 amended on 17.09.2002. Admittedly, in terms of the third proviso of Section 10 (1) (d) of the Act, 1947, the State Government is competent to refer the dispute to an Industrial Tribunal constituted by the State Government. Merely because in the reference order dated 13.06.2002 as amended on 17.09.2002, the third proviso does not find place, the same cannot and will not take away the powers of the State Government, which is the competent Government in terms of the Notification dated 03.07.1998, of referring the industrial dispute to a Tribunal constituted by it.*

70. In that case also, the learned Counsel for HAL had submitted that HAL being a controlled industry, the tribunals constituted by the State Government are not empowered to decide the case pertaining to controlled industry and that considering the definition of “Industrial Dispute” as defined under Section 2 (l) of the State Act, an industrial dispute concerning the controlled industries would not be governed by the provisions of the State Act. The said argument was rejected by the coordinate Bench keeping in view the notification dated 03.07.1998. The Court held that the powers vested in “appropriate Government” in this case, the State Government, which considering the third proviso to Section 10(1)(d) of the Central Act was empowered to refer the industrial dispute to a tribunal constituted by it and HAL finds place in the said notification.

71. As the learned Counsel for HAL has submitted that it is undisputed that HAL is a controlled industry and the appropriate Government in respect thereof is the Central Government and this submission has not been disputed by the learned Counsel for HAKS, who has merely submitted that although the Central Government is the appropriate Government, in exercise of its powers under Section 39 of the Central Act it has delegated its powers to the State Government and as the judgment cited by the learned Counsel for HAL in support of his contention that the appropriate Government in relation to industrial disputes involving HAL is the Central Government, has been held not to be good law, I undertook the exercise to gather the

information regarding HAL available on its official website, which revealed the following facts.

72. The Company had its origin as Hindustan Aircraft Limited, which was incorporated on 23.12.1940 at Bangalore by Sri Walchand Hirachand in association with the then Government of Mysore, with the aim of manufacturing aircraft in India. In March 1941, the Government of India became one of the shareholders in the Company and subsequently the Government of India took over its management in 1942. In January 1951, Hindustan Aircraft Limited was placed under the administrative control of Ministry of Defence, Government of India.

73. In August 1963, Aeronautics India Limited was incorporated as a Company wholly owned by the Government of India, to undertake manufacture of Mig-21 aircraft under license. Thereafter, the Government decided to amalgamate Hindustan Aircraft Limited with Aircrafts India Ltd. so as to conserve resources in the field of aviation where the technical talent in the country was limited and to enable the activities of all the aircraft manufacturing units to be planned and coordinated in a most efficient and economical manner. Amalgamation of the two companies i.e. Hindustan Aircraft Limited and Aeronautics India Limited was brought about on 01.10. 1964 by an Amalgamation Order issued by the Government of India and the Company after the amalgamation was named as "Hindustan Aeronautics Limited (HAL)" with its principal business being design, development, manufacture, repair and overhaul of aircraft, helicopters, engines and related systems like avionics, instruments and accessories.

74. HAL is a Public Sector Undertaking, which is listed with the National Stock Exchange. 71.64% shares of the company are held by its promoter, which is the Central Government, in the name of the President of India. Thus it is a Government company as defined in Section 2(45) of the Companies Act, 2013, which corresponds to Section 617 of the Companies Act, 1956.

75. Section 2(a) of the Industrial Disputes Act (the Central Act) provides that in relation to any Industrial Disputes concerning any company in which not less than fifty-one per cent of the paid-up share capital is held by the Central Government, the "appropriate Government" would mean the Central Government. As 71.64% shares, i.e. more than fifty one per cent paid up share capital of HAL is held by the Central Government, the appropriate Government in relation to an industrial dispute concerning HAL will be the Central Government.

76. None of the precedents in which it has been held that the appropriate Government in relation to industrial disputes concerning HAL is the State Government, takes into consideration that Section 2(a) of the Central Act provides that in relation to any Industrial Disputes concerning any company in which not less than fifty-one per cent of the paid-up share capital is held by the Central Government, the "appropriate Government" would mean the Central Government and those are *sub-silentio* judgments so far as this point is concerned, which judgments fall within the category of exceptions to the binding precedents.

77. Therefore, my answer to Question A is that the Central Government is the

appropriate Government in respect to the industrial disputes concerning HAL, which is a Government Company in which more than 51% shares are held by the Central Government in the name of the President of India.

**Question B -**Whether the State Government was competent to refer the dispute between the parties for adjudication to the Tribunal?

78. Section 39 of the Central Act empowers the Central Government to delegate its powers to the State Government. In exercise of this power, the Central Government has issued a Notification dated 03.07.1998 whereby it has delegated its powers in relation numerous undertakings specified in the Schedule annexed with the said Notification, to the State Government. The Schedule appended to the said Notification includes HAL also. The Central Government having delegated its powers to the State Government under a statutory provision, the State Government is legally authorized to exercise the delegated power in respect of HAL and to make a reference of the dispute to a Tribunal in accordance with the law.

**Question C -**Whether the State Government could have referred the dispute to an Industrial Tribunal constituted under Section 4-B of the U. P. Industrial Disputes Act or the dispute ought to have been referred to a Tribunal constituted under Section 7-A of the Industrial Disputes Act (Central)?

79. Section 10 (1) of the Central Act reads as follows: -

***"Section 10 - Reference of disputes to Boards, Courts or Tribunals***

*(1) Where the appropriate Government is of opinion that any industrial dispute exists or is apprehended, it may at any time, by order in writing-*

*(a) refer the dispute to a Board for promoting a settlement thereof; or*

*(b) refer any matter appearing to be connected with or relevant to the dispute to a court for inquiry; or*

*(c) refer the dispute or any matter appearing to be connected with, or relevant to, the dispute, if it relates to any matter specified in the Second Schedule, to a Labour court for adjudication; or*

*(d) refer the dispute or any matter appearing to be connected with, or relevant to, the dispute, whether it relates to any matter specified in the Second Schedule or the Third Schedule, to a Tribunal for adjudication:*

*Provided that where the dispute relates to any matter specified in the Third Schedule and is not likely to affect more than one hundred workmen, the appropriate Government may, if it so thinks fit, make the reference to a Labour Court under clause (c):*

*Provided further that where the dispute relates to a public utility service and a notice under Section 22 has been given, the appropriate Government shall, unless it considers that the notice has been frivolously or veraciously given or that it would be inexpedient so to do, make a reference under this sub-Section notwithstanding that any other proceedings under this Act in respect of the dispute may have commenced:*

***Provided also that where the dispute in the relation to which the Central Government is the appropriate Government, it shall be competent for the Government to refer the dispute to a Labour Court or an Industrial Tribunal, as the case may be, constituted by the***

***State Government**. (inserted with effect from 21.08.1994)"*

(Emphasis added)

80. The third proviso to Section 10 of the Central Act categorically provides that where the dispute in relation to which the Central Government is the appropriate Government, it shall be competent for that Government to refer the dispute to a Labour Court or an Industrial Tribunal, as the case may be, constituted by the State Government. If the Central Government can refer a dispute to an Industrial Tribunal constituted by the State Government, the same can also be done by the State Government in exercise of powers delegated by the Central Government under Section 39 of the Central Act.

81. In view of the aforesaid discussion, this Court is of the considered view that the State Government has the power to refer the dispute concerning HAL to the Industrial Tribunal constituted under Section 4-B of the State Act.

**Question D -**Whether the question regarding the contract between HAL and the canteen operator being sham or not, was included in the scope of reference? If not, its effect.

82. Before proceeding to decide this issue, it will be appropriate to have a look at the statutory provision contained in Section 10(4) of the Industrial Disputes Act, 1947 (the Central Act), which is as follows: -

*"(4) Where in an order referring an industrial dispute to a Labour Court, Tribunal or National Tribunal under this Section or in a subsequent order, the appropriate Government has specified the points of dispute for adjudication, the Labour Court or **the Tribunal** or the National Tribunal, as the case may be, **shall confine its adjudication to those points and matters incidental thereto."***

(Emphasis added)

83. The State Government had referred only the following two questions for decision of the Tribunal: -

*a. Whether termination of services of 57 employees working in canteen of HAL, Lucknow, by the employer M/s Hindustan Aeronautics Ltd., Lucknow on 25.11.2000 and 23.12.2000, is proper and legal? If not, to what relief the employees are entitled.*

*b. Whether it would be proper and legal to treat the workmen as employees of HAL, Lucknow keeping in view their long continuous service? If yes, its effect.*

84. Apparently, the Tribunal was required to examine the question whether the workmen in question can be treated as employees of HAL keeping in view their long continuous service. The scope of enquiry was limited to this question only and the Tribunal could not have examined the question whether the workmen can be treated to be employees of HAL on any other ground.

85. Section 10(4) of the Central Act mandates the Tribunals to confine their adjudication to the matters referred to them and the matters incidental thereto. The issue whether the contract between HAL and the canteen contractor was sham, is not incidental to the issue whether the workmen in question can be treated as employees of HAL keeping in view their long continuous service.

86. In **TISCO Ltd. v. State of Jharkhand:** (2014) 1 SCC 536, the Hon'ble Supreme Court held that: -

*"16. The Industrial Tribunal/Labour Court constituted under the Industrial Disputes Act is a creature of that statute. It acquires jurisdiction on the basis of reference made to it.* ***The Tribunal has to confine itself within the scope of the subject-matter of reference and cannot travel beyond the same.*** *This is the view taken by this Court in a number of cases including in National Engg. Industries Ltd. v. State of Rajasthan [(2000) 1 SCC 371]. It is for this reason that it becomes the bounden duty of the appropriate Government to make the reference appropriately which is reflective of the real/exact nature of "dispute" between the parties."*

(Emphasis added)

87. In view of the foregoing discussion, I find that the finding returned by the Industrial Tribunal, that the contract between HAL and the canteen contractor was sham, was beyond the scope of reference and it has been recorded without jurisdiction.

**Question E-** Whether the Industrial Tribunal has jurisdiction to examine the plea of the contract between HAL and the canteen contractor being sham or void?

88. Before proceeding to answer this question, it would be beneficial to have a look at Section 10 of the Contract Labour Act, which is as follows: -

***"10. Prohibition of employment of contract labour****.—(1) Notwithstanding anything contained in this Act,* ***the appropriate Government may, after consultation with the Central Board or, as the case may be, a State Board, prohibit, by Notification in the Official Gazette, employment of contract labour in any process, operation or other work in any establishment.***

*(2) Before issuing any Notification under sub-Section (1) in relation to an establishment, the appropriate Government shall have regard to the conditions of work and benefits provided for the contract labour in that establishment and other relevant factors, such as—*

*(a) whether the process, operation or other work is incidental to, or necessary for the industry, trade, business, manufacture or occupation that is carried on in the establishment;*

*(b) whether it is of perennial nature, that is to say, it is of sufficient duration having regard to the nature of industry, trade, business, manufacture or occupation carried on in that establishment; *

*(c) whether it is done ordinarily through regular workmen in that establishment or an establishment similar thereto;*

*(d) whether it is sufficient to employ considerable number of whole-time workmen.*

*Explanation.—If a question arises whether any process or operation or other work is of perennial nature, the decision of the appropriate Government thereon shall be final."*

(Emphasis added)

89. The Governor of U.P., in consultation with U.P. State Contract Labour Advisory Board, had issued a Notification dated 24.04.1990 under Section 10(1) of the Contract Labour Act prohibiting employment of contract labour

in engineering industries situated in the State. Only M/s Jay Vijay Metal Industries, Varanasi and BHEL, Haridwar were exempted from the operation of this Notification. Subsequently, HAL requested the U.P. Government for granting exemption from the applicability of the Contract Labour Act. The request was accepted by the State Government and another Notification dated 04.03.1991 was issued through whereby HAL Lucknow and its Units at Kanpur and Korva (Sultanpur) were also granted exemption from the provisions of the Contract Labour Act.

90. The learned Counsel for HAKS has submitted that although the prohibition to engage contract labour in various industrial units in the State of U.P., including HAL, was imposed after consultation with the Board, the exemption from prohibition was granted without consultation with the Board.

91. When the appropriate Government in respect of industrial disputes concerning HAL is the Central Government and State Government is not the appropriate Government in relation to HAL, the State Government has no power under the Contract Labour Act either to prohibit engagement of contract labour in HAL or to grant exemption from such prohibition and such prohibition could be imposed or exemption could be granted only by means of a Notification issued by the Central Government.

92. In **SAIL v. National Union Waterfront Workers:** (2001) 7 SCC 1, a Constitution Bench of five Hon'ble Judges of the Supreme Court held (in paragraph 125 of the judgment) that: -

*(2)(a) A Notification under Section 10(1) of the CLRA Act prohibiting employment of contract labour in any process, operation or other work in any establishment has to be issued by the appropriate Government…*

* * *

*(5) On issuance of prohibition Notification under Section 10(1) of the CLRA Act prohibiting employment of contract labour or otherwise, in an industrial dispute brought before it by any contract labour in regard to conditions of service, the industrial adjudicator will have to consider the question whether the contractor has been interposed either on the ground of having undertaken to produce any given result for the establishment or for supply of contract labour for work of the establishment under a genuine contract or is a mere ruse/camouflage to evade compliance with various beneficial legislations so as to deprive the workers of the benefit thereunder. If the contract is found to be not genuine but a mere camouflage, the so-called contract labour will have to be treated as employees of the principal employer who shall be directed to regularise the services of the contract labour in the establishment concerned subject to the conditions as may be specified by it for that purpose in the light of para 6 hereunder.*

(Emphasis added)

93. Thus the adjudicator can examine the validity of the contract only if the appropriate Government has issued a Notification under Section 10 of the Contract Labour Act prohibiting engagement of contract labour in the organization in question, which is not the case here as the appropriate Government, which is the Central Government, has not issued any Notification under Section 10 of the Contract Labour Act.

94. Further, although the State Government is not the appropriate Government in respect of HAL, it has also

exempted HAL from the prohibition vide Notification dated 04.03.1991 issued by it.

95. Although Sri. Dhruv Mathur has challenged the validity of the Notification dated 04.03.1991 during submissions advanced before this Court, the validity thereof has not been challenged at any earlier point of time and its quashing has not been sought. Therefore, the validity of the long standing Notification dated 04.03.1991 cannot be challenged without seeking its quashing. Moreover, it is not necessary to go into this question when this Court has already held that the State Government is not the appropriate Government in respect of HAL and the appropriate Government for HAL is the Central Government.

96. In view of the foregoing discussion, the Court finds that there is no prohibition against engagement of contract labour in HAL.

97. The Industrial Tribunal has jurisdiction to adjudicate upon industrial disputes, which expression is defined in section 2(k) of the Central act as follows: -

*"industrial dispute" means any dispute or difference between employers and employers, or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person;*

98. Unless HAL is found to be the employer of the workmen in question, the dispute between the workmen and HAL is not an 'industrial dispute' within the meaning of the expression used in the Industrial Disputes Act and the Tribunal has no jurisdiction to adjudicate upon the dispute between HAL and the workmen.

99. Therefore, the Tribunal has no jurisdiction to examine the validity of the contract between HAL and the canteen contractor and to record a finding that the contract is sham.

100. When this Court has come to a conclusion that the impugned award passed by the Industrial Tribunal is without jurisdiction, the Writ Petition can be decided without deciding any more question. However, since the dispute is quite old and the Writ Petitions are also pending since 2012 and elaborate submissions have been heard on all the points, this Court proceeds to decide all the questions to put a quietus to the entire dispute.

**Question F-** Whether the finding recorded by the Tribunal that the contract between HAL and the canteen operator was sham, is sustainable in law?

101. The Tribunal has concluded that in fact the 66 canteen workers, regarding whom the reference was made, were the employees of the principal employer – HAL and the contract between HAL and the canteen contractor was merely a paper agreement and it was sham. The basis for recording the aforesaid finding is that (1) the canteen employees had sought parity in wages with the wages payable to unskilled workmen of HAL, which was accepted by the deputy Labour Commissioner, Kanpur and the challenge to the aforesaid order made by HAL remained unsuccessful up to the Hon'ble Supreme Court, (2) the contract between HAL and the contractor contained provisions beneficial to the workmen and it also provided that in case

the canteen contractor fails to make any payment to the workmen, HAL will pay the amount to them and will recover the same from the contractor and (3) the contract also provided that the contractor shall pay increments in wages to the workmen in furtherance of Government Orders and orders of Deputy Labour Commissioner and HAL will reimburse the contractor.

102. Regarding the first reason for recording the aforesaid finding, i.e., the canteen employees had sought parity in wages with the wages payable to unskilled workmen of HAL, which was accepted by an order dated 28.04.1989 passed by the Labour Commissioner and the challenge to the aforesaid order made by HAL remained unsuccessful up to the Hon'ble Supreme Court, suffice it to say that an order granting parity in pay with the unskilled workers of HAL will in no manner affect the validity of the contract between HAL and the canteen contractor.

103. Secondly, in the order dated 28.04.1989 passed by the Labour Commissioner, U.P., Lucknow, on the representation submitted by HAKS seeking pay parity with directly appointed unskilled workers, the following points for determination had been framed: -

*(1) Whether the application of the Union dated 5-6-82 is maintainable on the ground that it does not fall under the purview of Rule 25 of the U. P. Contract Labour (Regulaton and Abolition) Rules, 1975?*

*(2) To what wages, dearness allowance, house rent, travelling allowance, medical facilities and other conditions of service of the sanitation workers are canteen employees are entitled?*

*(3) Whether the engineering wages being at present paid by the Contractors were within the meaning of Rule 25(iv)?*

104. The Labour Commissioner held that Uttar Pradesh Contract Labours (Regulation and Abolition) Rules, 1975 provides that the contract labours will not be paid wages less than the minimum wages or the minimum agreed wages. The Labour Commissioner found that the work being performed by the contractual canteen workers was not the same are was being performed by the directly appointed workmen, they are entitled for minimum wages which were being paid to directly appointed unskilled workmen. The request for modification of other service conditions was rejected.

105. HAL had challenged the aforesaid order dated 28.04.1989 by filing Writ Petition No. 4553 of 1989, which was dismissed by means of a judgment and order dated 28.01.1994 and the order passed by the Labour Commissioner was affirmed. SLP (Civil) No. 8768 of 1994 filed by HAL was also dismissed and the order dated 28.04.1989 passed by the Labour Commissioner attained finality. When the only finding given in the order dated 28.04.1989 passed by the Labour Commissioner was that the contract workers are entitled to wages equal to the minimum wages paid to directly appointed unskilled workmen and the claim for modification of other service conditions was rejected, the aforesaid order cannot form the basis of treating the contract workers to be the employees of HAL when the order did not record any finding to this effect.

106. The second and the third reasons assigned by the Tribunal for recording the

aforesaid finding is that the contract between HAL and the contractor contained provisions beneficial to the workmen and it also provided that in case the canteen contractor fails to make any payment wages of its increments to the workmen, HAL will pay the amount to them and will recover the same from the contractor.

107. In this regard, the following statutory provisions contained in the Contract Labour Act are to be kept into consideration: -

*"2(b) a workman shall be deemed to be employed as "contract labour" in or in connection with the work of an establishment when he is hired in or in connection with such work by or through a contractor, with or without the knowledge of the principal employer;*

*2(c) "contractor", in relation to an establishment, means a person who undertakes to produce a given result for the establishment, other than a mere supply of goods or articles of manufacture to such establishment, through contract labour or who supplies contract labour for any work of the establishment and includes a sub-contractor;*

*2(g) "principal employer" means—*

*(i) in relation to any office or department of the Government or a local authority, the head of that office or department or such other officer as the Government or the local authority, as the case may be, may specify in this behalf,*

*(ii) in a factory, the owner or occupier of the factory and where a person has been named as the manager of the factory under the Factories Act, 1948 (63 of 1948), the person so named.*

* * *

***20. Liability of principal employer in certain cases**.—(1) If any amenity required to be provided under Section 16, Section 17, Section 18 or Section 19 for the benefit of the contract labour employed in an establishment is not provided by the contractor within the time prescribed therefor, such amenity shall be provided by the principal employer within such time as may be prescribed.*

*(2) All expenses incurred by the principal employer in providing the amenity may be recovered by the principal employer from the contractor either by deduction from any amount payable to the contractor under any contract or as a debt payable by the contractor.*

***21. Responsibility for payment of wages.**—(1) A contractor shall be responsible for payment of wages to each worker employed by him as contract labour and such wages shall be paid before the expiry of such period as may be prescribed.*

*(2) Every principal employer shall nominate a representative duly authorised by him to be present at the time of disbursement of wages by the contractor and it shall be the duty of such representative to certify the amounts paid as wages in such manner as may be prescribed.*

*(3) It shall be the duty of the contractor to ensure the disbursement of wages in the presence of the authorised representative of the principal employer.*

*(4)* ***In case the contractor fails to make payment of wages within the prescribed period or makes short payment, then the principal employer shall be liable to make payment of wages in full or the unpaid balance due, as the case may be, to the contract labour employed by the contractor and recover the amount so paid from the contractor*** *either by deduction from any amount payable to the contractor*

*under any contract or as a debt payable by the contractor."*

(Emphasis added)

108. Sections 20 and 21 of the Contract Labour Act fall in Chapter V of the Contract Labour Act, which is titled "Welfare and Health of Contract Labour" and which contains Sections 16 to 21. A perusal of the statutory provisions quoted above establishes that HAL being the principal employer, is under a statutory obligation to ensure beneficial provisions for the workmen of the contractor and to make payment of dues to the workmen in case the contractor fails to make the payments and thereafter to recover the same from the contractor. The conditions put in the contract between HAL and the canteen contractor in compliance of the aforesaid statutory mandate will not make the contract between HAL and the canteen contractor sham and it will not result in the contractual canteen workers employees of HAL.

109. The points to be considered while examining the validity of a contract between the principal employer and the employer have been explained by the Hon'ble Supreme Court in its judgment in the case of **International Airport Authority of India v. International Air Cargo Workers' Union**: (2009) 13 SCC, wherein it was held that: -

*"38. The tests that are applied to find out whether a person is an employee or an independent contractor may not automatically apply in finding out whether the contract labour agreement is a sham, nominal and is a mere camouflage. For example, if the contract is for supply of labour, necessarily, the labour supplied by the contractor will work under the directions, supervision and control of the principal employer* ***but that would not make the worker a direct employee of the principal employer, if the salary is paid by a contractor, if the right to regulate the employment is with the contractor, and the ultimate supervision and control lies with the contractor.***

*39. The principal employer only controls and directs the work to be done by a contract labour, when such labour is assigned/allotted/sent to him. But it is the contractor as employer, who chooses whether the worker is to be assigned/allotted to the principal employer or used otherwise. In short****, worker being the employee of the contractor, the ultimate supervision and control lies with the contractor as he decides where the employee will work and how long he will work and subject to what conditions. Only when the contractor assigns/sends the worker to work under the principal employer, the worker works under the supervision and control of the principal employer but that is secondary control. The primary control is with the contractor."***

(Emphasis added)

110. In **Balwant Rai Saluja v. Air India Ltd.,** (2014) 9 SCC 407, the Hon'ble Supreme Court considered numerous precedents on this point and held that: -

*"41. We conclude that the question as regards the status of workmen hired by a contractor to work in a statutory canteen established under the provisions of the 1948 Act has been well settled by a catena of decisions of this Court. This Court is in agreement with the principle laid down in Indian Petrochemicals case [Indian Petrochemicals Corpn. Ltd. v. Shramik Sena, (1999) 6 SCC 439] wherein it was held that :*

*"22. ... **the workmen of a statutory canteen would be the workmen of the establishment for the purpose of the 1948 Act only and not for all other purposes."***

*We add that **the statutory obligation created under Section 46 of the 1948 Act, although establishes certain liability of the principal employer towards the workers employed in the given canteen facility, this must be restricted only to the 1948 Act and it does not govern the rights of employees with reference to appointment, seniority, promotion, dismissal, disciplinary actions, retirement benefits, etc., which are the subject-matter of various other legislations, policies, etc.** Therefore, we cannot accept the submission of Shri Jayant Bhushan, learned counsel that the employees of the statutory canteen ipso facto become the employees of the principal employer.*

* * *

*52. To ascertain whether the workers of the contractor can be treated as the employees of the factory or company on whose premises they run the said statutory canteen, this Court must apply the test of complete administrative control. Furthermore, it would be necessary to show that there exists an employer-employee relationship between the factory and the workmen working in the canteen. In this regard, the following cases would be relevant to be noticed.*

* * *

*65. Thus, it can be concluded that the relevant factors to be taken into consideration to establish an employer-employee relationship would include, inter alia:*

*(i) who appoints the workers;*

*(ii) who pays the salary/remuneration;*

*(iii) who has the authority to dismiss;*

*(iv) who can take disciplinary action;*

*(v) whether there is continuity of service; and*

*(vi) extent of control and supervision i.e. whether there exists complete control and supervision.*

*As regards extent of control and supervision, we have already taken note of the observations in Bengal Nagpur Cotton Mills case [Bengal Nagpur Cotton Mills v. Bharat Lal, (2011) 1 SCC 635], International Airport Authority of India case [International Airport Authority of India v. International Air Cargo Workers' Union, (2009) 13 SCC 374] and Nalco case [National Aluminium Co. Ltd. v. Ananta Kishore Rout, (2014) 6 SCC 756]."*

(Emphasis added)

111. The decision in the case of **Balwant Rai Saluja (Supra)** was followed in **BHEL v. Mahendra Prasad Jakhmola:** (2019) 13 SCC 82 and the law laid down in **International Airport Authority of India** (Supra) has been followed in **Kirloskar Brothers Ltd. v. Ramcharan**, (2023) 1 SCC 463.

112. In the present case, the canteen contractor used to select and appoint the canteen workers, he used to pay them salaries, he used to assign them work and duties and he used to supervise and control their work and conduct. The employees were working in canteen and they were not performing any duties relating to the principal business of HAL, i.e., manufacturing parts of aircrafts. Therefore, the canteen workers cannot be treated to be the employees of HAL and there is no material to establish that the contract

between HAL and the canteen contractor was sham. The contrary finding recorded by the Industrial Tribunal, besides being without jurisdiction, is perverse also.

**Question G -**Whether the concerned employees are entitled for reinstatement, regularization of services and payment of back-wages?

113. It is undisputed that the employees had been appointed by the Canteen contractor, they were paid wages by the contractor and they worked under the supervision of the contractor. HAL was not their employer and when HAL was not liable to pay wages to them, the liability to pay back wages, if any, cannot also be fastened on HAL.

114. The services of the canteen employees were terminated by the canteen contractor after the subsidized canteen was replaced by a marked rate canteen and the business of the canteen and consequently requirement of man power for running the canteen, was reduced drastically. HAL offered deployment to all the 63 employees on casual basis to perform other duties in the HAL and they were directed to report in the technical training center at 09:00 a.m. on 27.11.2000. Although HAL did not have any legal obligation towards the canteen employees, it claims to have done it only on compassionate basis,. This offer was rejected by all the employees through similarly worded letters, claiming that the order for their redeployment was illegal as they were regular employees of HAL and not of the contractor. As has already been held above, the employees were employees of the canteen contractor and not of HAL.

115. Assuming that the employees considered them to be employees of HAL, the refusal of the employees to perform duties assigned by their alleged employer cannot be said to be justified and it will also disentitle them from claiming any benefits, including back wages, from HAL.

116. Thereafter on 09.12.2000, HAL had issued letters to all the concerned employees stating that the subsidised canteen was being restored as earlier and the employees should contact the canteen contractor and start working in the canteen. However, on the same date, the canteen contactor sent a letter stating that the office bearers of workers union had obstructed the working of the canteen, had turned all the persons out of the canteen and had locked up its door. Although the lock was opened at 11:45 hours but the canteen contactor and his employees were not permitted to enter the canteen.

117. Back wages are payable only when the employees are illegally restrained from working, although they are willing to perform their duties. In the present case, neither the employees worked at the places to which they were redeployed by HAL on compassionate basis, nor did day perform duties in the canteen. Therefore, the employees are not entitled to claim back wages.

118. As has already been held above, the employees were employed by the canteen contractor and HAL was merely their principal employer. Therefore, the employees had no right to claim reinstatement and regularization in HAL and they having declined to perform the duties assigned by HAL, had no right to claim any back wages.

119. The learned Counsel for HAKS has challenged the validity of retrenchment

order on the ground of violation of Section 25-N of the Industrial Disputes Act (the Central Act), which provides as follows: -

***"25-N. Conditions precedent to retrenchment of workmen.***—*(1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,—*

*(a) the workman has been given three months' notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and*

*(b) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf."*

120. Section 25-N falls in Chapter V-B of the Industrial Disputes Act (the Central Act), which contains "Special Provisions Relating To Lay-Off, Retrenchment And Closure In Certain Establishments". The establishments to which the special provisions contained in Chapter V-B would apply, have been mentioned in Section 25-K of the Act, which is as follows: -

***25-K. Application of Chapter V-B.***—*(1) The provisions of this Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months.*

*(2) If a question arises whether an industrial establishment is of a seasonal character or whether work is performed therein only intermittently, the decision of the appropriate Government thereon shall be final.*

121. The number of employees working in the canteen was admittedly far below 100. Sri. Mathur has submitted that at some point of time, as many as 103 employees were working in the canteen. However, the requirement for attracting Section 25-N is that not less than one hundred workmen were employed in the establishment on an average per working day for the preceding twelve months, which is not the case here. Therefore, the provision of Section 25-N will not apply to the present case.

**Question H -** Whether the impugned award is sustainable in law?

122. In view of the aforesaid discussion, this Court is of the view that the employees are not entitled to any relief and the Tribunal has wrongly passed the impugned award directing reinstatement of the canteen employees and consideration for regularization of their services. The Tribunal has not erred in rejecting the claim of the employees for payment of back wages.

123. Accordingly, Writ C No. 1000315 of 2012 is ***allowed.*** The award dated 09.08.2011 passed by the Presiding Officer, Industrial Tribunal (II), U.P., Lucknow in Award Case No. 52 of 2023, which has been published on 20.10.2011, is quashed. Writ C No. 1000491 of 2012 is ***dismissed.***

124. The parties will bear their own costs of litigation.

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**(2024) 11 ILRA 93**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 12.11.2024**

**BEFORE**

**THE HON'BLE IRSHAD ALI, J.**

Writ C No. 1002288 of 1994

**Kalloo ...Petitioner**
**Versus**
**State of U.P. ...Respondent**

**Counsel for the Petitioner:**
S.K. Bartariya, Vinay Misra

**Counsel for the Respondent:**
A.K. Verma, C.P.M. Tripathi, Manjive Shukla, Manju Gupta

**A. Revenue Law – Civil Procedure Code,1908 – Section 151 - Order IX - Rule 13 – UP Zamindari Abolition & Land Reform Act, 1950 – Section 229-B – Declaratory suit – Recall application to set aside the decree was rejected – Rather filing regular appeal, the petitioner moved an application u/s 151 CPC – Scope of inherent jurisdiction – Held, the inherent power so provided u/s 151 C.P.C. can only be invoked where there is no alternative remedy before the aggrieved party, but in the instant case, the remedy was to file an appeal u/s 331 (4) of the U.P. Z. A. & L. R. Act, therefore, the order passed on the application filed u/s 151 C.P.C. is wholly without jurisdiction and is liable to be set aside. (Para 20)**

**B. Revenue Law – Consolidation of Holding Act, 1953 – Section 4 – Abatement of proceeding – Notification u/s 4 already issued – Effect – Held, the power to entertain the application by other modes were not available to respondent nos. 1 to 3 due to abating of the proceedings – The respondent acted illegally and without authority of law in entertaining the application and setting aside the judgment and decree dated 31.8.1988. (Para 19)**

**Writ petition allowed.** (E-1)

(Delivered by Hon'ble Irshad Ali , J.)

1. Heard Sri Vinay Misra, learned counsel for the petitioners and learned Standing Counsel for the State-respondent.

2. Despite repeated time granted to the learned Standing Counsel for State-respondent, no counter affidavit has been filed till date and the case was adjourned on several occasion on the request of learned Standing Counsel and learned counsel for the petitioners.

3. Factual background of the case is that the petitioners were under occupation of the land bearing plot No.775-C measuring 8 bigha, 7 biswan and 15 biswansi situated in village Bhishampur Kumhrawan, Tehsil Malihabad, District Lucknow.

4. It is the case of the petitioners that the above land was never in possession of respondent no.4 whose mother was the Zamindar but only to defeat the claim of the petitioners, declared the said land as surplus which caused a clot on the title and right of the petitioners to cultivate the land in question.

5. For declaration of their title in respect of the said land, the petitioners filed a suit on 23.2.1983 under Section 229-B of the U.P. Zamindari Abolition and Land Reforms Act for declaring the petitioners as Bhumidhar of the l and in question. In the aforesaid suit, notices were served on all

the respondents including the State respondents but no respondent ventured to file the objection/ reply to the said suit and in these circumstances the suit was decreed on 31.8.1988 by the respondent No.5 declaring the petitioners as Bhumidhars of the land bearing plot No.775 measuring 8 bigha, 7 biswan and 15 biswansi situated in village Bhishampur Kumhrawan, Tehsil Malihabad, District Lucknow. The decree of the suit is annexed as Annexure-1 to the writ petition.

6. In the aforesaid suit, the State was a party who kept silent silent for almost a year and on 12.8.1989, respondent Nos.1 to 3, through D.G.C. (Revenue) moved an application under Order IX Rule 13 C.P.C. read with Section 151 C.P.C. for setting aside the judgment and decree dated 31.8.1988 on the ground that the said suit has been decided ex-parte.

7. The aforesaid recall application was not supported by any affidavit nor any application under Section 5 of the Limitation Act was filed and even no prayer to condone the delay in filing the recall application was made. The application for setting aide the judgment and decree dated 31.8.1988 was strongly contested by the petitioner and respondent Nos.1 to 3 failed to show any Rule or Law which could facilitate the court to set aside the judgment and order dated 31.8.1988 and consequently, the court rejected the application vide order dated 8.4.1994.

8. After passing of the order dated 8.4.1994, the remedy open to the respondent Nos.1 to 3 was to prefer an appeal under Section 331 (4) of the U.P. Zamindari Abolition and Land Reforms Act, but the respondents chose to file an application under Section 151 C.P.C. on 29.4.1994 with the prayer that the order dated 8.4.1994 may be reviewed and the ex-parte judgment and order dated 31.8.1989 may be set aside and the suit may be decided on its respective merits.

9. In the above said application, no affidavit was appended and the same ground as was taken earlier in the application so preferred under Order 9 Rule 13 C.P.C., which had been decided and rejected on 8.4.1994. The land in question came under consolidation operation and notification under Section 4 of the U.P. Consolidation of Holdings Act was issued and published in the U.P. Gazette on 9.4.1994.

10. The application preferred by the respondent Nos.1 to 3 on 20.4.1994 was decided on 20.7.1994 and the decree and order dated 31.8.1988 was set aside.

11. The petitioners have filed the present writ petition challenging the order dated 20.7.1994 (Annexure-7 to the writ petition), passed by the respondent No.5 as also last line of the order dated 20.7.1994 (Annexure-6 to the writ petition), after summoning the record.

12. Assailing he order dated 20.7.1994, submission of learned counsel for the petitioners is that since village Bhishampur Kumhrawan, Tehsil Malihabad, District Lucknow has been brought under consolidation operations and notification to that effect was published on 9.4.1994 and thus, even if the proceedings had been pending, they would have abated but in the instant matter on 8.4.1994, the application so preferred by respondent Nos.1 to 3 for setting aside the order dated 31.8.1988 was rejected and thus on 9.4.1994 nothing was pending.

13. Second submission is that village has been brought under consolidation operations vide notification dated 9.4.1994, the respondent No.5 lost all control over the proceedings and thus, he acted illegally and without authority of law in entertaining the application and then setting aside the judgment and decree dated 31.8.1988 vide judgment and order dated 20.7.1994.

14. Third submission is that the petitioners are in continuous and uninterrupted possession over the land in question since before 1356 fasli and have become Bhumidhars by operation of law. It is further submitted that the respondent Nos.1 to 3 could not have invoked the jurisdiction under Section 151 C.P.C. for the same relief for which they had earlier moved an application under Order IX Rule 13 C.P.C. read with Section 151 C.P.C. which had been rejected and thus, the second application for same cause was barred by res-judicata.

15. Next submission is that inherent powers so provided under Section 151 C.P.C. can only be invoked where there is no other alternative remedy before the aggrieved party but in the instant case, remedy open to the respondents was prefer an appeal under Section 331 (4) of the U.P. Zamindari Abolition and Land Reforms Act.

16. On the other hand, learned Standing Counsel states that the respondent has not committed any mistake in passing the impugned order dated 20.7.1994. The same is just and valid and does not suffer from any infirmity or illegality.

17. After having heard the rival contention of learned counsel for the parties, I perused the material on record.

18. It is reflected that at earlier point of time, the respondent Nos.1 to 3 moved an application under Order 9 Rule 13 C.P.C. read with Section 151 C.P.C. before the authority concerned, which was rejected vide order dated 8.4.1994 and the remedy available to the respondent Nos.1 to 3 was that they would have filed an appeal under Section 331 (4) of the U.P. Zamindari Abolition and Land Reforms Act, but they chose the file an application under Section 151 C.P.C., which is barred by res-judicata. In the opinion of the Court, the argument advancedb y the learned counsel for the petitioner has substance. The respondent Nos.1 to 3 having no jurisdiction to move an application under Section 151 C.P.C. before the revenue authority for setting aside the order passed on 20.7.1994.

19. On perusal of the record, it is also reflected that a notification under Section 4 of Consolidation of Holdings Act was issued by the State Government on 9.4.1994, therefore, the power to entertain the application by other modes were not available to respondent Nos.1 to 3 due to abating of the proceedings, thus, the respondent acted illegally and without authority of law in entertaining the application and setting aside the judgment and decree dated 31.8.1988 vide judgment and order dated 20.7.1994. this action of the respondent is illegal and suffers from vices of rule of law.

20. The inherent power so provided under Section 151 C.P.C. can only be invoked where there is no alternative remedy before the aggrieved party, but in the instant case, the remedy was to file an appeal under Section 331 (4) of the U.P. Zamindari Abolition and Land Reforms Act, therefore, the order passed on the

application filed under Section 151 C.P.C. is wholly without jurisdiction and is liable to be set aside.

21. The otherwise argument advanced by learned counsel for the respondent has no force of law, therefore, it is hereby rejected.

22. In view of the above, in the considered opinion of the Court, the order impugned being wholly without jurisdiction, suffers from vices of res-judicata, therefore, is not sustainable in law and is hereby set aside. The writ petition succeeds and is **allowed.**

23. No order as to cost.

24. Connected writ petition(s) may be de-linked.

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**(2024) 11 ILRA 96**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 21.11.2024**

**BEFORE**

**THE HON'BLE SHEKHAR B. SARAF, J.**
**THE HON'BLE VIPIN CHANDRA DIXIT, J.**

Income Tax Appeal No. 85 of 2024

**Pr. CIT, Bareilly, U.P. ...Appellant**
**Versus**
**Dharam Singh ...Respondent**

**Counsel for the Appellant:**
Sri Manu Ghildyal, Advocate

**Counsel for the Respondent:**
Sri Ambleshwar Pandey & Sri Ramesh Kumar, Advocates

**Tax Law - Income Tax Act, 1961 - Sections 143(3) & 263 - Assessment Years 2017-18 - Appeal against order of Appellate Tribunal by Commissioner - Assessment order completed by Assessing Officer - Subsequently, PCIT by exercising his jurisdiction revised order on ground that assessment was prejudicial to interest of revenue, set aside assessment order, directed for de novo assessment - Order was challenged before Tribunal and held that inquiries by Assessing Officer in respect of cash deposit of Rs.91 lakhs was proper and thereafter assessment order was passed. (Para 3)**

**Held, Tribunal has gone into details of questionnaire issued by Assessing Officer, examined inquiry carried out by Assessing Officer in detail and thereafter, held in favour of assessee, examined replies given by assessee - Tribunal concluded that it was not possible under any circumstances to conclude that Assessing Officer misstated fact or recorded false order sheet entries and further held that only conclusion was that allegation made by PCIT that Assessing Officer not recorded any finding with regard to cash deposit during demonetization period, was not based on material on record - Twin conditions of assessment order being erroneous and prejudicial to interest of revenue in order to invoke power by PCIT u/s 263 of Act was not fulfilled as Assessing Officer made all inquiries and verifications as per law. (Para 7)**

**Thus, no perversity in impugned order as no substantial question of law involved, accordingly appeal dismissed. (Para 16)**

**Appeal Dismissed.** (E-13)

**List of Cases cited:**

1. Chunilal Vs Mehta and Sons Ltd. Vs Century Spg. & Mfg. Co. Ltd. reported in 1962 SCC OnLine SC 57, (Para 6)

2. Pr. CIT Vs Bhadani Financiers Pvt. Ltd. reported in (2022) 447 ITR 305, (Para 7)

3. Arulvelu Vs St.reported in (2009) 10 SCC 206, (Para 24 to 27)

4. S.R. Tewari Vs U.O.I.reported in (2013) 6 SCC 602, (Para 30)

5. CIT Vs Ajay Kapoor reported in 2013 SCC OnLine Del 2779, (Para 14 to 16)

(Delivered by Hon'ble Shekhar B. Saraf, J.)

1. Heard learned counsel appearing on behalf of the parties.

2. This is an appeal under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as "the Act") wherein the revenue is challenging an order dated June 18, 2024 passed by the Income Tax Appellate Tribunal (hereinafter referred to as 'Tribunal'), Delhi Benches "B", New Delhi in ITA No.821/Del/2022 (Assessment Years 2017- 18).

3. The factual matrix of the present case is that the assessment order was completed by the Assessing Officer under Section 143(3) of the Act. Subsequently, the Principal Commissioner of Income Tax exercised his jurisdiction under Section 263 of the Act and revised the order passed by the Assessing Officer on the ground that the assessment carried out was prejudicial to the interest of revenue and thereby set aside the assessment order and directed for *de novo assessment*. The said order passed by the Principal Commissioner of Income Tax was challenged before the Tribunal, which upon examination in great detail of the inquiries carried out by the Assessing Officer especially in respect of the cash deposit of Rs.91 lakhs, has came to the conclusion that proper inquiry was carried out by the Assessing Officer and only thereafter assessment order was passed.

4. In the present appeal the Appellant-Department has proposed the following substantial questions of law from the impugned order dated June 18, 2024 passed by Tribunal, which need to be determined by this court:-

*i. Whether on the facts and circumstances of the case and in law, the Tribunal has erred in holding that the Assessing Officer while passing the assessment order u/s 143(3) dated 21.06.2019 has verified the details asked for by him and has conducted enquiries before making assessment whereas the Principal Commissioner of Income Tax in his order u/s 263 of the Act has found that no proper enquiry has been conducted by the AO on issue of cash deposited during demonetization period, scrap sale and non-submission of audit report while making the assessment of the case?*

*ii. Whether on the facts and circumstances of the case and in law, the Tribunal is justified in holding that the exercise of jurisdiction u/s 263 of the Act by the Principal Commissioner of Income Tax in the present case is invalid, unsustainable and the assessment order cannot be held to be erroneous and prejudicial to the interest of the Revenue while the Principal Commissioner of Income Tax has initiated proceedings of 263 after thorough observation of the assessment record?*

5. This Court dealt with the first substantial question of law by examining the relevant portion of the impugned order of Tribunal. The relevant portion of the decision of Tribunal is extracted below:

*"14. As could be seen from the materials placed on record, beginning from 11.08.2018 to 07.06.2019, a period of almost one year, the Assessing Officer has conducted thorough inquiry by issuing a notice under section 143(2) as well as*

*notices under section 142(1) of the Act with questionnaire calling upon the assessee not only to furnish the details of cash deposits in the bank account, but also explain the source thereof. The Assessing Officer has also called upon the assessee to explain the reason for low profit compared to the turnover. It is a matter of record that the assessee has responded to each of the queries raised by the Assessing Officer in the questionnaire by explaining the source of cash deposits as well as various other details called for. Not only the Assessing Officer has conducted threadbare inquiry on various issues by issuing number of notices to the assessee, but he has also conducted discreet inquiries from third parties, including the banks, wherein, the assessee has held account by issuing notices under section 133(6) of the Act. The result of such inquiries has been meticulously noted down by the Assessing Officer in the order-sheet maintained in the assessment record."*

6. Furthermore, this Court perused the order of the Tribunal with regard to the second substantial question of law. The relevant portion of the decision of the Tribunal is extracted below:

*"17. The primary conditions for invoking section 263 are, the order sought to be revised must be erroneous and at the same time prejudicial to the interest of Revenue. Unless, these twin conditions are satisfied, section 263 of the Act cannot be invoked. In the facts of the present case, learned PCIT has put much emphasis on Explanation 2 to section 263 of the Act. In our view, Explanation 2 to section 263 of the Act does not invest unbridled power with the revisionary authority so as to empower him to invoke revisionary jurisdiction arbitrarily. The words appearing in Explanation 2(a) to the effect that "the order is passed without making inquiries or verification which could have been made", certainly do not mean that on mere allegation that in the opinion of the revisionary authority the Assessing Officer has not made inquiries or verifications which should have been made, revisionary power can be invoked. Allegation of lack of enquiry by the Assessing Officer has to be substantiated based on record and cannot be conjured out of thin air."*

7. Upon a perusal of the impugned order, we find that the Tribunal has gone into the details of the questionnaire issued by the Assessing Officer, examined the inquiry carried out by the Assessing Officer in detail and also examined the replies given by the assessee. It is only after having carried out the said examination, the Tribunal has came to the finding that it was not possible under any circumstances to conclude that the Assessing Officer has misstated the fact or had recorded false order sheet entries. The Tribunal further held that the only conclusion one can reach is that the allegation made by the Principal Commissioner of Income Tax that the Assessing Officer has not recorded any finding with regard to cash deposit during demonetization period, is not based on the material on record or rather contrary to the material on record. The Tribunal further went ahead and held that the twin conditions of the assessment order being erroneous and at the same time prejudicial to the interest of the revenue in order to invoke the power of Principal Commissioner of Income Tax under Section 263 of the Act was not fulfilled as the Assessing Officer had made all inquiries and verifications as required under the law.

8. Before delving into the present controversy, it would be expedient to examine the scope of jurisdiction of this Court under section 260A of the Act. It is a

settled proposition that the Tribunal is the final authority to decide on the issue of facts. The High court can only interfere in the order of Tribunal if there exists a substantial question of law.

9. A Constitution Bench of the Supreme Court headed by Hon'ble B.P. Sinha, the Chief Justice of India in case of **Chunilal V. Mehta and Sons Ltd. v. Century Spg. and Mfg. Co. Ltd.** reported in **1962 SCC OnLine SC 57** has laid down the following tests to determine whether a substantial question of law is involved or not. The tests are:

*(a) whether directly or indirectly it affects substantial rights of the parties, or*

*(b) the question is of general public importance, or*

*(c) whether it is an open question in the sense that the issue is not settled by pronouncement of this Court or Privy Council or by the Federal Court, or*

*(d) the issue is not free from difficulty, and*

*(e) it calls for a discussion for alternative view.*

*The relevant paragraph of the aforesaid judgment is extracted below:*

*"6. We are in general agreement with the view taken by the Madras High Court and we think that while the view taken by the Bombay High Court is rather narrow the one taken by the former High Court of Nagpur is too wide. The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether if directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law."*

10. The Delhi High Court in **Pr. CIT v. Bhadani Financiers Pvt. Ltd.** reported in **(2022) 447 ITR 305** has observed what would amount to substantial question of law for filing an appeal under Section 260A of the Act. The relevant paragraph of the judgment is extracted below:

*"7. 'Substantial' means 'having substance, essential, real, of sound worth, important or considerable.' To be 'substantial', a question of law must be debatable, not previously settled. The Supreme Court and several High Courts have held that a substantial question of law is involved if it directly or indirectly affects substantial rights of the parties or it is of general public importance, it is an open question in the sense that the issue has not been settled by a pronouncement of the court or it is not free from difficulty or it calls for a discussion for alternate views.* ***A High Court under section 260A of the Act has limited jurisdiction to interfere with findings of fact recorded by the Tribunal. If findings of Tribunal are irrational, perverse or unreasonable, then only interference of court would be justified. It would also be justified if a finding of fact is arrived at by the Tribunal without any evidence****. Section 260A is akin to section 100 of the Code of Civil Procedure, 1908. (see Sampath Iyengar's Law of Income Tax)."*

*(Emphasis added)*

11. In the instant appeal the department has only challenged the fact finding of the Tribunal. A catena of Supreme Court judgments have concluded that in relation to facts, no substantial question of law would arise unless the finding of fact is perverse. A factual decision is perverse when it is without any evidence or when it cannot be reasonably arrived at by a prudent man. Finding based upon surmises, conjectures or suspicion or when they are not rationally possible, have to be struck down. One may therefore examine the interpretation of 'perversity' by various Courts including the Supreme Court.

12. The Supreme Court in the case of **Arulvelu v. State** reported in **(2009) 10 SCC 206** has defined 'perversity' by following various judgments. The relevant paragraphs of the judgment are extracted below:

*"24. The expression "perverse" has been dealt with in a number of cases. In Gaya Din v. Hanuman Prasad ((2001) 1 SCC 501] this Court observed that the expression "perverse" means that the findings of the subordinate authority are not supported by the evidence brought on record or they are against the law or suffer from the vice of procedural irregularity.*

*25. In Parry's (Calcutta) Employees' Union v. Parry & Co. Ltd. [AIR 1966 Cal 31] the Court observed that "perverse finding" means a finding which is not only against the weight of evidence but is altogether against the evidence itself. In Triveni Rubber & Plastics v. CCE [1994 Supp (3) SCC 665: AIR 1994 SC 1341] the Court observed that this is not a case where it can be said that the findings of the authorities are based on no evidence or that they are so perverse that no reasonable person would have arrived at those findings.*

*26. In M.S. Narayanagouda v. Girijamma [AIR 1977 Kant 58] the Court observed that any order made in conscious violation of pleading and law is a perverse order. In Moffett v. Gough [(1878) 1 LR Ir 331] the Court observed that a "perverse verdict" may probably be defined as one that is not only against the weight of evidence but is altogether against the evidence. In Godfrey v. Godfrey [106 NW 814] the Court defined "perverse" as turned the wrong way, not right; distorted from the right; turned away or deviating from what is right, proper, correct, etc.*

*27. The expression "perverse" has been defined by various dictionaries in the following manner:*

*1. Oxford Advanced Learner's Dictionary of Current English, 6th Edn.*

*"Perverse. Showing deliberate determination to behave in a way that most people think is wrong, unacceptable or unreasonable."*

*2. Longman Dictionary of Contemporary English, International Edn.*

*Perverse. Deliberately departing from what is normal and reasonable.*

*3. The New Oxford Dictionary of English, 1998 Edn.*

*Perverse. Law (of a verdict) against the weight of evidence or the direction of the judge on a point of law.*

*4. The New Lexicon Webster's Dictionary of the English Language (Deluxe Encyclopedic Edn.)*

*Perverse. Purposely deviating from accepted or expected behavior or opinion; wicked or wayward; stubborn; cross or petulant.*

*5. Stroud's Judicial Dictionary of Words & Phrases, 4th Edn.*

*"Perverse. A perverse verdict may probably be defined as one that is not*

*only against the weight of evidence but is altogether against the evidence."*

13. The Supreme Court in the case of **S.R. Tewari v. Union of India reported in (2013) 6 SCC 602** has laid down the attributes of perversity. The relevant paragraph is extracted below:

*"30. The findings of fact recorded by a court can be held to be perverse if the findings have been arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant/inadmissible material. The finding may also be said to be perverse if it is "against the weight of evidence", or if the finding so outrageously defies logic as to suffer from the vice of irrationality. If a decision is arrived at on the basis of no evidence or thoroughly unreliable evidence and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, the conclusions would not be treated as perverse and the findings would not be interfered with. (Vide Rajinder Kumar Kindra v. Delhi Admn. [(1984) 4 SCC 635: 1985 SCC (L&S) 131: AIR 1984 SC 1805], Kuldeep Singh v. Commr. of Police [(1999) 2 SCC 10: 1999 SCC (L&S) 429: AIR 1999 SC 677], Gamini Bala Koteswara Rao v. State of A.P. [(2009) 10 SCC 636: (2010) 1 SCC (Cri) 372: AIR 2010 SC 589] and Babu v. State of Kerala [(2010) 9 SCC 189: (2010) 3 SCC (Cri) 1179].)"*

14. The Delhi High Court in case of **CIT v. Ajay Kapoor reported in 2013 SCC OnLine Del 2779** has further elaborated as to what constitutes 'perversity'. The relevant paragraphs of the judgment are extracted below:

*"14. Perversity, in the present case, is occasioned due to two reasons: firstly, by wrongly placing onus on the revenue though the facts were in personal knowledge of the assessee, and secondly, by ignoring the admission of the respondent that they had indulged in unaccounted sales of Rs. 9.7 crores. In spite of admission and the seized document, it has been observed that there was no material with the revenue to prima facie justify any addition towards unrecorded investment in stock. Allegations, in the present case, are not based upon weighing of evidence but for altogether a wrong decision. The decision suffers from vice of irrationality, rendering it infirm in law. In Municipal Committee, Hoshiarpur v. Punjab SEB (2010) 13 SCC 216 it has been held that:*

*"28. If a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then the finding is rendered infirm in the eye of the law. If the findings of the Court are based on no evidence or evidence which is thoroughly unreliable or evidence that suffers from the vice of procedural irregularity or the findings are such that no reasonable person would have arrived at those findings, then the findings may be said to be perverse. Further if the findings are either ipse dixit of the Court or based on conjecture and surmises, the judgment suffers from the additional infirmity of non-application of mind and thus, stands vitiated. (Vide Bharatha Matha v. R. Vijaya Renganathan [(2010) 11 SCC 483: AIR 2010 SC 2685].)"*

*15. Earlier in Dhirajlal Girdharilal v. CIT (1954) 26 ITR 736 (SC) it was observed:-*

*"....if the court of fact, whose decision on a question of fact is final, arrives at this decision by considering material which is irrelevant to the enquiry,*

*or by considering material which is partly relevant and partly irrelevant, or bases its decision partly on conjectures, surmises and suspicions, and partly on evidence, then in such a situation clearly an issue of law arise....*

*.....It is well established that when a court of fact acts on material, partly relevant and partly irrelevant, it is impossible to say to what extent the mind of the court was affected by the irrelevant material used by it in arriving at its finding. Such a finding is vitiated because of the use of inadmissible material and thereby an issue of law arises,"*

*16. In CIT v. Daulat Ram Rawat Mull (1973) 87 ITR 349 it has been held that onus of proving what is apparent is not real is on the party who claims it to be so. There should be direct nexus between the conclusions of fact arrived at, or inferred, and the primary facts upon which the conclusion is based. When irrelevant consideration and extraneous materials form the substratum of an order, or the authority has proceeded in a wrong presumption which is erroneous in law, as in the present case, question of law arises and when the said contention is found to be correct, then the order is perverse. A factual decision is perverse when it is without any evidence or when the factual decision, in view of the fact on record, cannot be reasonably entertained. Finding based upon surmises, conjectures or suspicion or when they are not rationally possible have to be struck down. In CIT v. S.P. Jain (1973) 87 ITR 370 (SC) it has been observed that a factual conclusion is regarded as perverse when no person duly instructed or acting judicially could upon the record before him, have reached the conclusion arrived at by the tribunal/authority."*

15. In light of the judgments of the Supreme Court and High Courts cited above, we are of the view that unless there is any perversity in finding of facts, no substantial question of law would arise. Furthermore, for the Tribunal's fact finding to be perverse, it would have be established that the finding of fact by the Tribunal directly or indirectly affects substantial rights of the assessee in the sense that it is such as could not have been reasonably arrived at on the material placed on record before the Tribunal. In the present factual matrix, it is crystal clear that the Tribunal has examined the facts in great detail, and only thereafter, held in favour of the assessee.

16. Therefore, we do not find any perversity in the impugned order and there exists no reason to admit this appeal as there is no substantial question of law involved. The appeal filed under Section 260A of the Act can only be sustained if there was perversity in the findings of the Tribunal which would have amounted to a substantial question of law. In the present case, we do not find anything perverse in the order passed by the Tribunal and accordingly, dismiss the appeal on the ground that no substantial question of law is present in the instant appeal.

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**(2024) 11 ILRA 102**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 12.11.2024**

**BEFORE**

**THE HON'BLE RAJAN ROY, J.**
**THE HON'BLE MANISH KUMAR, J.**

Writ Tax No. 264 of 2024

**M/s A.V. Pharma ...Petitioner**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Anuj Kudesia, Anurag Tyagi

**Counsel for the Respondents:**
C.S.C.

**Tax Law - U.P.G.S.T. Act, 2017 - Sections 44(1) & 73(10) - Quashing of assessment order - Financial year 2017-18 - Due date for filing annual return was 31st December of end of Financial Year i.e 31.12.2018 for financial year 2017-18, due date for filing annual return extended vide notification dated 03.02.2018 to 05.02.2020 and adopted by St. of U.P. vide notification dated 05.02.2020 - Based on this notification, period of three years mentioned in Section 73(10) would end on 05.02.2023 meaning thereby, order u/s 73 (9) for financial year 2017-18 could have been passed by 05.02.2023 but not after it - Opposite parties relied on notification dated 24.04.2023 to submit that they could have passed order up till 31.12.2023, they omit to consider para no. 2 of said notification which says that notification would be applicable retrospectively but only from 31.03.2023 means if time limit of three years prescribed in Section 73(10) r/w Section 44(1) expired prior to 31.03.2023, then notification extending time limit for passing order u/s 73(9) would not be applicable. (Para 7)**

**Thus, impugned orders are beyond time limit and beyond jurisdiction, accounts of petitioner which have been freezed shall be de-freezed. (Para 8)**

**Writ Petition allowed.** (E-13)

(Delivered by Hon'ble Rajan Roy, J.
&
Hon'ble Manish Kumar, J.)

1. Supplementary affidavit on behalf of petitioner and short counter affidavit on behalf of State filed today are taken on record.

2. Heard Shri Anuj Kudesia, learned counsel for the petitioner and learned Additional Chief Standing Counsel for the State as also Shri Akhilesh Kumar, Deputy Commissioner, State G.S.T., Lucknow, who is present before this Court.

3. The present writ petition has been filed with the following reliefs:-

*"i) to issue a writ, order or direction in the nature of Certiorari quashing the order on Form GST DRC-13 dated 05.10.2024 issued by Deputy Commissioner, State Tax, Sector 05, Lucknow contained as annexure no. 1 to this writ petition.*

*ii) to issue a writ, order or direction in the nature of certiorari quashing the assessment order and DRC-07 dated 02.12.2023 issued by Deputy Commissioner, State Tax, Sector-5, Lucknow contained as annexure no. 2 to this writ petition.*

*iii) to issue a writ, order or direction in the nature of mandamus commanding the respondents to direct the petitioner bank to de-freeze the two bank accounts operated petitioners i.e. account No. 7711564951 and Accout No. 9946014812 in Kotak Mahindra Bank. "*

4. The contention of learned counsel for the petitioner is that the impugned orders are barred by sub Section 10 of Section 73 of the U.P.G.S.T. Act, 2017 (hereinafter referred to as, the Act, 2017) as they have been passed beyond the time limit prescribed therein as calculated from the due date of filing annual returns prescribed in Section 44 (1), which was extended to 05.02.2020 and the time limit of three years ended on 05.02.2023 but the impugned orders are dated 05.10.2024 and 02.12.2023, therefore, the impugned orders are without jurisdiction.

5. After hearing the parties, what comes out is that for justifying the time limit within which the impugned orders have been passed under Section 73 (9) and (10) of the Act, 2017 for the financial year 2017-18 reliance is being placed upon a notification dated 24.04.2023 by which the time limit of three years mentioned in sub Section 10 of Section 73 was extended for the financial year 2017-18 upto 31.12.2023, however, what is being omitted from consideration by the opposite party is that this notification dated 24.04.2023 has been given retrospective effect only from 31.03.2023 and not prior to it, now, in this context we may refer to Section 73 (10) of the Act, 2017, which reads as under:-

*"(10) The proper officer shall issue the order under sub-section (9) within three years from the due date for furnishing of annual return for the financial year to which the tax not paid or short paid or input tax credit wrongly availed or utilised relates to or within three years from the date of erroneous refund."*

6. We may also refer to Section 44(1) of the Act, 2017, which reads as under:-

*"44. Annual return -(1) Every registered person, other than an Input Service Distributor, a person paying tax under section 51 or section 52, a casual taxable person and a non-resident taxable person, shall furnish an annual return for every financial year electronically in such form and manner as may be prescribed on or before the thirty-first day of December following the end of such financial year.*

*Provided that the Commissioner may, on the recommendations of the Council and for reasons to be recorded in writing, by notification, extend the time limit for furnishing the annual return for such class of registered persons as may be specified therein:*

*Provided further that any extension of time limit notified by the Commissioner of Central tax shall be deemed to be notified by the Commissioner."*

7. Ordinarily the due date for filing annual return is 31st December of the end of the Financial Year, which in the case of financial year 2017-18 would be 31.12.2018, however, this due date for filing annual return, as already observed earlier, was extended vide notification of the Central Board of Direct Taxes and Customs dated, 03.02.2018 to 05.02.2020 and this notification was adopted by the State of U.P. vide notification dated 05.02.2020. Based on this notification, the period of three years mentioned in sub Section 10 of Section 73 would end on 05.02.2023 meaning thereby, an order under sub Section 9 of Section 73 for the financial year 2017-18 could have been passed by 05.02.2023 but not after it. Now the opposite parties are relying on the notification dated 24.04.2023 to submit that in fact they could have passed the order under sub Section 9 of Section 73 uptill 31.12.2023 however in doing so, they omit to consider para no. 2 of the said notification which says that the notification dated 24.04.2023 would be applicable retrospectively but only from 31.03.2023 meaning thereby, if the time limit of three years prescribed in sub Section 10 of Section 73 read with sub Section 1 of Section 44 expired prior to 31.03.2023 then the notification dated 24.04.2023 extending the time limit for passing of an order under sub Section 9 of Section 73 would not be applicable, apparently so.

8. Apparently the impugned orders are beyond the time limit prescribed under sub

Section 10 of Section 73 as applicable for the financial year 2017-18 and therefore the impugned orders are beyond jurisdiction being barred by the time provided in the said provision, therefore, we **allow** the writ petition and quash the impugned orders dated 05.10.2024 and 02.12.2023 issued by the Deputy Commissioner, State Tax, Sector 05, Lucknow.

9. Consequences shall follow, accordingly. The accounts of the petitioner which have been freezed shall be de-freezed.

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**(2024) 11 ILRA 105**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 11.11.2024**

**BEFORE**

**THE HON'BLE AJAY BHANOT, J.**

Writ Tax No. 1689 of 2024

**M/s Monotech Systems Limited ...Petitioner**

**Versus**

**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Abhinav Mehrotra, Satya Vrata Mehrotra, Utkarsh Malviya

**Counsel for the Respondents:**
C.S.C.

**Tax Law - Goods and Services Tax Act, 2017 - Section 129 - Detention, seizure and release of goods and conveyances in transit - Against order of Additional Commissioner - Technical breaches - Impugned order arises out of proceedings after interception of vehicle carrying offending goods - Revenue authorities upon finding that E-Way Bill was not filled, asked assessee/petitioner to show cause and after physical inspection of goods no discrepancy found. (Para 2)**

**Contention by assessee that goods in vehicle were fully reconciled with E-Way Bill - Non filling of part of E-Way Bill would not ipso facto attract proceedings u/s 129, GST Act. (Para 4)**

**When substantial compliance of provisions was disclosed and physical inspection of goods tallies with goods declared in E-Way Bill and no intent of tax evasion was made out, proceedings under aforesaid section became vitiated - Thus, impugned order quashed. (Para 7)**

**Writ Petition allowed.** (E-13)

**List of Cases cited:**

VSL Alloys (India) Pvt. Ltd. Vs St. of U.P. & anr.(Writ Tax No.- 637 of 2018)

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

1. Heard Sri Abhinav Mehrotra, learned counsel for the petitioner and Sri Ravi Shankar Pandey, learned Additional Chief Standing Counsel for the State respondents.

2. The impugned order arises out of proceedings which were instituted after interception of the vehicle carrying the offending goods. The revenue authorities upon finding that the E-Way Bill was not filled asked the assessee to show cause. After physical inspection of the goods no discrepancy was found.

3. The goods tallied with the description in the E-Way Bill.

4. The assessee on show cause resisted the proceedings by filing a response. According to the assessee there was no intent to evade the tax. The goods in the

vehicle were fully reconciled with the E-Way bill. Non filling of the part of E-Way Bill would not ipso facto trigger the proceedings under Section 129 of the GST Act in the facts of this case.

5. The adjudicating authority as well as the appellate authority negatived the submissions made on behalf of the assessee and passed the impugned order.

6. The facts which are admitted and disclosed from the records are these. There was no discrepancy in the goods which were physically found at the time of inspection and details of goods recorded in the E-Way Bill available with the driver of the vehicle. The authorities below have not found any intent to evade tax.

7. This Court has set its face against initiation of proceedings under Section 129 of GST Act in the wake of mere technical breaches. When substantial compliance of the provisions is disclosed and when the physical inspection of goods tallies with the goods declared in the E-Way Bill and no intent of tax evasion is made out, proceedings under Section 129 of GST Act become vitiated.

8. In **VSL Alloys (India) Pvt. Ltd. Vs State of U.P. and Another (Writ Tax No.- 637 of 2018)** this Court has held as under:

"We are in full agreement with the submission of learned counsel for the petitioner and after perusal of the relevant documents, we find no ill intention at the hands of the petitioner nor the petitioner was supposed to fill up Part-B giving all the details including the vehicle number before the goods are loaded in a vehicle, which is meant for transportation to the same to its end destination.

In the present case, all the documents were accompanied the goods, details are duly mentioned which reflects from the perusal of the documents. Merely of none mentioning of the vehicle no. in Part-B cannot be a ground for seizure of the goods. We hold that the order of seizure is totally illegal and once the petitioner has placed the material and evidence with regard to its claim, it was obligatory on the part of the respondent no.2 to consider and pass an appropriate reasoned order. In this case, no reasons are assigned nor any discussion is mentioned in the impugned order of seizure and notice of penalty. The respondent no.2 has also not considered the above notification dated 07.03.2018."

9. The matter is covered by the judgment rendered in **VSL Alloys (supra).** The impugned order dated 22.12.2023 passed by the respondent no. 2, Additional Commissioner, Commercial Tax Grade-2 (Appeal)-I, State Tax, Noida is unsustainable and is quashed.

10. The petition is allowed.

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**(2024) 11 ILRA 106**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 18.11.2024**

**BEFORE**

**THE HON'BLE SHEKHAR B. SARAF, J.**
**THE HON'BLE VIPIN CHANDRA DIXIT, J.**

Writ Tax No. 1757 of 2024

**Agmotex Fabrics Pvt. Ltd. ...Petitioner**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Mr. Rahul Agarwal, Advocate

**Counsel for the Respondents:**
Mr. Ankur Agarwal, Standing Counsel

**Tax Law - Goods and Services Tax Act, 2017 - Section 74 - Financial Year 2021-22 - Audi alteram partem - Petitioner's business premises were searched, found that petitioner wrongly availed ITC and refund of same on purchase of glycerin, fatty acid and finishing chemical made up of perfumery compound, not produced proper evidence with regard to cancelling of 115 e-way bills - Show cause notice issued, asking it to refund excess utilization of ITC along with penalty amounting to Rs. 2,24,24,710/- Petitioner denied allegations, mentioning that show cause notice not supported with any evidence - By another show cause notice amount of tax and penalty revised - In spite of reply having been uploaded by petitioner on portal, respondent asked to appear for personal hearing - Petitioner informed that it has already given detailed reply - By impugned order, respondent demanded tax along with penalty and interest amounting to Rs. 37,31,642/-. (Para 3)**

**Contention that impugned order was copy-paste of reply given by petitioner to show cause notice and explanation provided not considered in reasonable manner - Raw materials glycerine, fatty acid and perfumery compound used for manufacture of fabrics, not dealt in order. (Para 4)**

**Held, entire show cause notice and order are speculative in nature, based on survey report, by which authorities concluded that said items are not used without carrying out any test for manufacture of fabrics. (Para 5)**

**Explanation given by petitioner in affidavit annexing certificates of three experts not considered by respondents, no reasons provided for rejection - Once such explanation has provided, it was incumbent upon respondents to have tested fabrics to come to conclusion that three raw materials were not used in manufacture of fabrics, without granting opportunity of hearing, fastening of such liability was arbitrary and illegal - Thus, impugned order quashed, set aside. (Para 6, 20)**

**Writ Petition allowed.** (E-13)

**List of Cases cited:**

1. St. of Kerala Vs K.T. Shaduli Grocery Dealer Etc. reported in (1977) 2 SCC 777, (Para 2, 3, 12)

2. Mrs. Maneka Gandhi Vs U.O.I.& anr. reported in (1978) 1 SCC 248, (Para 14)

3. Maharashtra St.Board of Secondary and Higher Secondary Education Vs K.S. Gandhi & ors.reported in (1991) 2 SCC 716, (Para 22)

4. A.S. Motors Private Limited Vs U.O.I. & ors. reported in (2013) 10 SCC 114, (Para 8)

5. Madhyamam Broadcasting Limited Vs U.O.I. & ors. reported in 2023 SCC OnLine 366, (Para 47)

6. St.Bank of India & ors. Vs Rajesh Agarwal & ors. reported in (2023) 6 SCC 1, (Para 36)

7. Singrauli Super Thermal Power Station Vs Ashwani Kumar Dubey & ors.(Civil Appeal No.3856/2022 decided on July 5, 2023), (Para 15 to 17)

8. S.R. Cold Storage Vs U.O.I. & ors. reported in 2022 SCC online (All) 550; [2022] 448 ITR 37 (All), (Para 25 to 28)

9. M/s Eastern Machine Bricks and Tiles Industries Vs St. of U.P. & ors., Neutral Citation No.- 2024:AHC:3222, (Para 10, 11)

(Delivered by Hon'ble Shekhar B. Saraf, J.)

1. Heard learned counsel for the parties and perused the record.

2. This writ petition has been filed under Article 226 of the Constitution of India, wherein the writ petitioner is aggrieved by the impugned order dated September 12, 2024 passed by the Deputy Commissioner, State Goods & Services Tax, Sector 17, Kanpur/respondent No.3 under Section 74 of the Goods and Services Tax Act, 2017 (hereinafter referred as 'the Act') for the financial year 2021-22.

3. Factual matrix giving rise to the instant writ petition is delineated below:

a. On December 27, 2022, petitioner's Business premises were subjected to a search where it was found that the petitioner had wrongly availed the Input Tax Credit ( hereinafter referred to as "ITC") and refund of the same on purchase of glycerin, fatty acid and finishing chemical made up of perfumery compound. It was further found that the petitioner had also not produced proper evidence with regard to cancelling 115 e-way bills by it during the financial year 2021-22. Subsequently, a show cause notice dated March 20, 2024 was issued to the petitioner by the Deputy Commissioner, State Goods and Services Tax Sector-17, Kanpur/respondent No.3 asking it to refund the excess utilization of ITC along with penalty amounting to Rs. 2,24,24,710/- by April 19, 2024.

b. In response to the aforesaid show cause notice, the petitioner filed its reply on April 18, 2024 wherein it denied the allegations made against it mentioning that the show cause notice was not supported with any evidence or material.

c. On June 4, 2024, another show cause notice under Section 74 of the Act was issued to the petitioner by which the amount of Tax and penalty was revised to Rs. 2,43,74,686/-.

d. In response to the notice dated June 4, 2024, the petitioner again filed its reply supported with an affidavit wherein it again denied the allegation that the glycerin, fatty acid and perfumery compound are not used in its business and submitted that these materials are used as 'raw material' by the company in manufacturing process and the ITC with respect to these materials has been legally availed by the petitioner. Explanation in respect of 115 e-way bills that were cancelled during the financial year 2021-22 was also furnished by the petitioner in his affidavit.

e. In spite of the reply dated July 2, 2024 having been uploaded by the petitioner on the portal, the respondent no. 3 gave a reminder dated August 8, 2024 to the petitioner and asked it to appear for personal hearing and submit its reply by September 6, 2024.

f. The petitioner vide its letter dated August 10, 2024, informed the respondent no. 3 that it has already given a detailed reply dated July 2, 2024 in response to the show cause notice.

g. Notwithstanding reply submitted by the petitioner, the respondent No. 3 passed the order dated September 12, 2024 under Section 74 of the Act imposing a demand of Tax along with penalty and interest amounting to Rs. 37,31,642/- upon the petitioner. Relevant portion of the said order reads as under:

*"उक्त दाखिल स्पष्टीकरण का अनुशीलन करने पर पाया गया कि दाखिल स्पष्टीकरण के बिन्दु सं0-09, 11, 23 में यह उल्लेख किया गया है कि आरोपित बिन्दुओं के सम्बन्ध में प्रश्नगत कारण बताओ नोटिस के साथ तथा कथित तथ्यों का अपेक्षित विवरण नही दिया गया है और न ही जांच रिपोर्ट दी गयी है। यह भी उल्लेख किया गया है कि ई.वे बिल को अभिखण्डित करने का कोई साक्ष्य न तो नोटिस में संदर्भित है और न ही प्रदत्त किया गया है तथा न्यायहित में सम्पूर्ण जांच*

*के अभिलेखों के निरीक्षण एवं परीक्षण करने हेतु समय दिये जाने का उल्लेख किया गया है।*

*अतः उपरोक्त के सम्बन्ध में रिफ्रेन्स सं0-ZD09824054924X दिनांक.07-08-2024 द्वारा करदाता को अभिलेखों के निरीक्षण एवं परीक्षण करने हेतु दिनांक 06-09-2024 के लिए नोटिस जारी करते हुए यह अपेक्षा की गयी कि करदाता उपस्थित होकर प्रश्नगत बिन्दुओं का अवलोकन कर लें तथा तथ्यपरक स्पष्टीकरण दाखिल करें। उक्त के सम्बन्ध में पत्रावली के अवलोकन हेतु कोई उपस्थित नहीं हुआ और न ही कोई तथ्य परक स्पष्टीकरण दाखिल किया गया। ज्ञातव्य है कि केवल 02 बिन्दओं पर करदेयता निर्धारित किये जाने का नोटिस में उल्लेख किया गया है। पूर्व में दाखिल स्पष्टीकरण में 28 बिन्दुओं का जवाब दाखिल किया गया है जिसमें बिन्दु सं0-09,11 व 23 को छोड़कर शेष बिन्दुओं करदाता का अपना मत प्रकट किया गया है जो नोटिस के बिन्दुओं से अलग से बिन्दु सं0-09,11 व 23 में नोटिस का जवाब देने के स्थान पर कतिपय तथ्यो की प्रमाणिकता व जांच रिपोर्ट प्राप्त न कराये जाने का उल्लेख किया गया है। जिसके लिए करदाता को उपस्थित होकर पत्रावली का परीक्षण करने हेतु उक्त नोटिस जारी की गयी थी। परन्तु करदाता उपस्थित नही हुए। अतः दाखिल स्पष्टीकरण सन्तोषजनक न पाये जाने के कारण अस्वीकार करते हुए निम्न प्रकार करदेयता, ब्याज व अर्थदण्ड आरोपित किया जाता है रू.*

*1- यह कि करदाता द्वारा ग्लिसरीन, फैटी एसिड एवं परफ्यूमरी कंपाउंड से बने फिनिशिंग कैमिकल ६ एस०एम०पी० लिक्विड ,एच०एस०एन०.3809) की खरीद प्रदर्शित की गयी है। जबकि इन वस्तुओं का कम्पनी के द्वारा निर्माण प्रक्रिया में कोई उपयोग नहीं है। खरीदों में सन्निहित आई०टी०सी० का उपयोग करते हुए अपनी करदेयता को सेटआफ किया गया है अथवा इन प्रदर्शित खरीदों में अन्तरतलित आई०टी०सी० का रिफण्ड प्राप्त किया गया है। अतः करदाता द्वारा गलत ढंग से उपभोग किये गये आई०टी०सी० तथा उसके गलत तरीके से प्राप्त किये गये रिफण्ड को उसकी करदेयता, ब्याज व अर्थदण्ड सहित निर्धारित किया जाना अपेक्षित है।ठ*

***(Below is the English translation of the above Hindi portion)***

*On perusal of the said filed explanation, it is found that in the point Nos.9, 11 & 23 of the filed explanation, it has been mentioned that the desired details of the so called facts have not been given with respect to the Show Cause Notice regarding the charges, nor has been the inquiry report provided. It has also been mentioned that neither there is any reference of any evidence in the notice regarding the quashing of the e-way bill nor has it been provided and it is mentioned to provide time, in the interest of justice, for inspection and examination of records of the entire inquiry.*

*Therefore, in relation to the above, by issuing notice to the taxpayer for inspection and examination of the records on 06-09-2024 by reference No.ZD090824054924X dated 07-08-2024, it was expected that the taxpayer should appear and observe the point in question and submit explanation based on facts.*

*In relation to the above, no one appeared for inspection of the file nor any factual explanation was submitted. It is to be noted that notice mentions that the tax liability has been determined only on 02 points. In the explanation filed earlier, reply has been filed on 28 points in which except for point Nos. 09, 11 & 23, the taxpayer has expressed his side on the remaining points; for the separate points-point nos. 09, 11 & 23, instead of replying to the notice, it has been mentioned that the authenticity of certain facts and inquiry report have not been received regarding which the said notice was issued to the taxpayer to appear and examine the file. But the taxpayer did not appear, therefore, the explanation submitted, not being found satisfactory, is rejected and hence, the tax liability, interest and penalty are imposed as follows:-*

*1- that taxpayer has shown the purchase of Glycerine, fatty acid and finishing chemical/SMP Liquid (HSN-3809) made from perfumery compound, whereas, the company has no role in manufacturing process of these goods. By availing the ITC embodied in the purchases, tax liability has*

*been set off or refund has been obtained for the ITC involved in the shown purchases. Therefore, for the the ITC wrongly availed by the taxpayer and refund obtained so wrongfully, it is expected to determine his tax liability with the interest and penalty.*

*h. Being aggrieved by the impugned order dated September 12, 2024, the petitioner has filed the instant writ petition.*

4. Sri Rahul Agarwal, learned counsel for the petitioner submits that the impugned order is only a copy-paste of the reply given by the petitioner to the show cause notice and the explanation provided therein has not been considered in a reasonable manner. The argument of the petitioner is that raw materials glycerine, fatty acid and perfumery compound are used for manufacture of fabrics which have not been dealt with in the order.

5. In fact, it is very clear that the entire show cause notice and the order are speculative in nature and are based on one survey report only using which the authorities have come to a conclusion that the said items are not being used without carrying out any test for manufacture of fabrics. Normally, this Court does not interfere in the order passed under Section 74 of the Act when there is a provision of statutory appeal under the Act. However, it is to be seen that the petitioner was not present on the date when the matter was to be heard and no further opportunity of hearing was given by the respondents to the petitioner to explain its reply in detail.

6. The explanation given by the petitioner in the affidavit annexing certificates of three experts has not been considered at all by the respondents and no reasons have been provided as to why the same are to be rejected. Once such an explanation has been provided, it was incumbent upon the respondents to have tested the fabrics to come to a conclusion that three raw materials were not used in the manufacture of fabrics. Without having done so and without granting an opportunity of fair hearing to the petitioner, fastening of such liability upon the petitioner is arbitrary and illegal and cannot be countenanced by this Court.

7. Counsel on behalf of the respondents has supported the show cause notice and the findings in the impugned order by submitting that the petitioner was not able to provide explanation on all points, and therefore, the order under Section 74 of the Act fastens liability on the points that were not answered by the petitioner. However, he had no explanation as to why the fabrics were not examined to check whether the petitioner had used the raw materials in the manufacture of the same.

8. Before dwelling into the present factual matrix, this Court is of the view that one needs to examine the scope of natural justice as has been explained by a catena of judgements of the Supreme Court and this Court. The Supreme Court, in **State of Kerala v. K.T. Shaduli Grocery Dealer Etc**. reported in **(1977) 2 SCC 777,** while examining the provisions of the Kerala General Sales Tax Act, 1963, laid down the contours of the principles of natural justice. The relevant paragraphs of the said judgement read as under:

*"2. Now, the law is well settled that tax authorities entrusted with the power to make assessment of tax discharge quasi-judicial functions and they are bound to observe principles of natural justice in*

*reaching their conclusions. It is true, as pointed out by this Court in Dhakeswari Cotton Mills Ltd. v. CIT [AIR 1955 SC 154 : (1955) 1 SCR 941 : (1955) 27 ITR 126] that a taxing officer "is not fettered by technical rules of evidence and pleadings, and that he is entitled to act on material which may not be accepted as evidence in a court of law", but that does not absolve him from the obligation to comply with the fundamental rules of justice which have come to be known in the jurisprudence of administrative law as principles of natural justice. It is, however, necessary to remember that the rules of natural justice are not a constant: they are not absolute and rigid rules having universal application. It was pointed out by this Court in Suresh Koshy George v. University of Kerala [AIR 1969 SC 198 : (1969) 1 SCR 317 : (1969) 1 SCJ 543] that "the rules of natural justice are not embodied rules" and in the same case this Court approved the following observations from the judgment of Tucker, L.J. in Russel v. Duke of Norfolk [(1949) 1 All ER 109] :*

*"There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth. Accordingly I do not derive much assistance from the definitions of natural justice which have been from time to time used, but, whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case."*

*3. One of the rules which constitutes a part of the principles of natural justice is the rule of audi alteram partem which requires that no man should be condemned unheard. It is indeed a requirement of the duty to act fairly which lies on all quasi-judicial authorities and this duty has been extended also to the authorities holding administrative enquiries involving civil consequences or affecting rights of parties because as pointed out by this Court in A.K. Kraipak v. Union of India [(1969) 2 SCC 262 : (1970) 1 SCR 457] "the aim of the rules of natural justice is to secure justice or to put it negatively, to prevent miscarriage of justice" and justice, in a society which has accepted socialism as its article of faith in the Constitution is dispensed not only by judicial or quasi-judicial authorities but also by authorities discharging administrative functions. This rule which requires an opportunity to be heard to be given to a person likely to be affected by a decision is also, like the genus of which it is a species, not an inflexible rule having a fixed connotation. It has a variable content depending on the nature of the inquiry, the framework of the law under which it is held, the constitution of the authority holding the inquiry, the nature and character of the rights affected and the consequences flowing from the decision. It is, therefore, not possible to say that in every case the rule of audi alteram partem requires that a particular specified procedure is to be followed. It may be that in a given case the rule of audi alteram partem may import a requirement that witnesses whose statements are sought to be relied upon by the authority holding the inquiry should be permitted to be cross-examined by the party affected while in some other case it may not. The procedure required to be adopted for giving an opportunity to a person to be heard must necessarily depend on facts and circumstances of each case."*

9. The Court in the said judgment also dealt with the issue of disclosing the

relevant documents that the respondent authorities are relying upon in the show cause notice to the assessee. The relevant paragraph is delineated below:

*"12. This Court further fully approved of the four propositions laid down by the Lahore High Court in Seth Gurmukh Singh v. Commissioner of Income Tax [(1944) 12 ITR 393 (Lahore HC)]. This Court was of the opinion that the Taxing Authorities had violated certain fundamental rules of natural justice in that they did not disclose to the assessee the information supplied to it by the departmental representatives. This case was relied upon by this Court in a later decision in Raghubar Mandal Harihar Mandal's case (supra) where it reiterated the decision of this Court in Dhakeswari Cotton Mills Ltd.'s case (supra), and while further endorsing the decision of the Lahore High Court in Seth Gurmukh Singh's case pointed out the rules laid down by the Lahore High Court for proceeding under sub-section (3) of Section 23 of the Income-tax Act and observed as follows:*

*"The rules laid down in that decision were these: (1) While proceeding under sub-section (3) of section 23 of the Income-tax Act, the Income-tax Officer is not bound to rely on such evidence produced by the assessee as he considers to be false; (2) if he proposes to make an estimate in disregard of the evidence, oral or documentary, led by the assessee, he should in fairness disclose to the assessee the material on which he is going to found that estimate; (3) he is not however debarred from relying on private sources of information, which sources he may not disclose to the assessee at all; and (4) in case he proposes to use against the assessee the result of any private inquiries made by him, he must commu- nicate to the assessee the substance of the information so proposed to be utilised to such an extent as to put the assessee in possession of full particulars of the case he is expected to meet and should further give him ample opportunity to meet it, if possible."*

*It will thus be noticed that this Court clearly laid down that while the Income-tax Officer was not debarred from relying on any material against the assessee, justice and fair-play demanded that the sources of information relied upon by the Income-tax Officer must be disclosed to the assessee so that he is in a position to rebut the same and an opportunity should be given to the assessee to meet the effect the aforesaid information."*

10. The Apex Court in **Mrs. Maneka Gandhi v. Union of India and another reported in (1978) 1 SCC 248** laid down the ratio in relation to the principles of audi alteram partem in the doctrine of natural justice. The relevant paragraph is delineated below:

*"14. .....But at the same time it must be remembered that this is a rule of vital importance in the field of administrative law and it must not be jettisoned save in very exceptional circumstances where compulsive necessity so demands. It is a wholesome rule designed to secure the rule of law and the court should not be too ready to eschew it in its application to a given case. True it is that in questions of this kind a fanatical or doctrinaire approach should be avoided, but that does not mean that merely because the traditional methodology of a formalised hearing may have the effect of stultifying the exercise of the statutory power, the audi alteram partem should be wholly excluded. The court must make every effort to salvage*

*this cardinal rule to the maximum extent permissible in a given case. It must not be forgotten that "natural justice is pragmatically flexible and is amenable to capsulation under the compulsive pressure of circumstances". The audi alteram partem rule is not cast in a rigid mould and judicial decisions establish that it may suffer situational modifications. The core of it must, however, remain, namely, that the person affected must have a reasonable opportunity of being heard and the hearing must be a genuine hearing and not an empty public relations exercise. That is why Tucker, L.J., emphasised in Russel v. Duke of Norfolk [(1949) 1 All ER 109] that "whatever standard of natural justice is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case". What opportunity may be regarded as reasonable would necessarily depend on the practical necessities of the situation. It may be a sophisticated full-fledged hearing or it may be a hearing which is very brief and minimal : it may be a hearing prior to the decision or it may even be a post-decisional remedial hearing. The audi alteram partem rule is sufficiently flexible to permit modifications and variations to suit the exigencies of myriad kinds of situations which may arise."*

11. The Supreme Court in **Maharashtra State Board of Secondary and Higher Secondary Education v. K.S. Gandhi and Others reported in (1991) 2 SCC 716** held in paragraph 22 as under :

*"22. ..... The omnipresence and omniscience (sic) of the principle of natural justice acts as deterrence to arrive at arbitrary decision in flagrant infraction of fair play. But the applicability of the principles of natural justice is not a rule of thumb or a strait-jacket formula as an abstract proposition of law. It depends on the facts of the case, nature of the inquiry and the effect of the order/decision on the rights of the persons and attendants circumstances. ...."*

12. The Supreme Court in **A.S. Motors Private Limited v. Union of India and Others reported in (2013) 10 SCC 114** held as under :

*"8. Rules of natural justice, it is by now fairly well settled, are not rigid, immutable or embodied rules that may be capable of being put in straitjacket nor have the same been so evolved as to apply universally to all kind of domestic tribunals and enquiries. What the Courts in essence look for in every case where violation of the principles of natural justice is alleged is whether the affected party was given reasonable opportunity to present its case and whether the administrative authority had acted fairly, impartially and reasonably. The doctrine of audi alteram partem is thus aimed at striking at arbitrariness and want of fair play. Judicial pronouncements on the subject have, therefore, recognised that the demands of natural justice may be different in different situations depending upon not only the facts and circumstances of each case but also on the powers and composition of the Tribunal and the rules and regulations under which it functions. A Court examining a complaint based on violation of rules of natural justice is entitled to see whether the aggrieved party had indeed suffered any prejudice on account of such violation. To that extent there has been a shift from the earlier thought that even a technical infringement of the rules is sufficient to vitiate the action. Judicial pronouncements on the subject are a*

*legion. We may refer to only some of the decisions on the subject which should in our opinion suffice."*

13. In a recent judgement of the Supreme Court in **Madhyamam Broadcasting Limited v. Union of India and others** reported in **2023 SCC OnLine 366**, the Court reiterated the principles of natural justice that guarantee a reasonable procedure to be followed as per Article 14, 19 and 21 of the Constitution of India. The relevant paragraph of the said is delineated below:

*"47. The judgment of this Court in Maneka Gandhi (supra) spearheaded two doctrinal shifts on procedural fairness because of the constitutionalising of natural justice. Firstly, procedural fairness was no longer viewed merely as a means to secure a just outcome but a requirement that holds an inherent value in itself. In view of this shift, the Courts are now precluded from solely assessing procedural infringements based on whether the procedure would have prejudiced the outcome of the case [See ___; also see Swadeshi Cotton Mills v. Union of India; A.I.R. 1981 S.C. 818]. Instead, the courts would have to decide if the procedure that was followed infringed upon the right to a fair and reasonable procedure, independent of the outcome. In compliance with this line of thought, the courts have read the principles of natural justice into an enactment to save it from being declared unconstitutional on procedural grounds [See Olga Tellis v. Bombay Municipal Corporation: (1985) 3 SCC 545; C.B. Gautam v. Union of India:(1993) 1 SCC 78; Sahara India (Firm), Lucknow v. Commissioner of Income Tax, Central-I: (2008) 14 SCC 151 and Kesar Enterprises v. State of Uttar Pradesh: (2011) 13 SCC 733]. Secondly, natural justice principles breathe reasonableness into the procedure. Responding to the argument that the principles of natural justice are not static but are capable of being moulded to the circumstances, it was held that the core of natural justice guarantees a reasonable procedure which is a constitutional requirement entrenched in Articles 14, 19 and 21. The facet of audi alterum partem encompasses the components of notice, contents of the notice, reports of inquiry, and materials that are available for perusal. While situational modifications are permissible, the rules of natural justice cannot be modified to suit the needs of the situation to such an extent that the core of the principle is abrogated because it is the core that infuses procedural reasonableness. The burden is on the applicant to prove that the procedure that was followed (or not followed) by the adjudicating authority, in effect, infringes upon the core of the right to a fair and reasonable hearing."*

14. The judgement of the Supreme Court in **State Bank of India and others v. Rajesh Agarwal and others** reported in **(2023) 6 SCC 1** further expanded the said principles, extract of which is provided below:

*"36. We need to bear in mind that the principles of natural justice are not mere legal formalities. They constitute substantive obligations that need to be followed by decision-making and adjudicating authorities. The principles of natural justice act as a guarantee against arbitrary action, both in terms of procedure and substance, by judicial, quasi-judicial, and administrative authorities. Two fundamental principles of natural justice are entrenched in Indian jurisprudence: (i)*

*nemo judex in causa sua, which means that no person should be a judge in their own cause; and (ii) audi alteram partem, which means that a person affected by administrative, judicial or quasi-judicial action must be heard before a decision is taken. The courts generally favor interpretation of a statutory provision consistent with the principles of natural justice because it is presumed that the statutory authorities do not intend to contravene fundamental rights. Application of the said principles depends on the facts and circumstances of the case, express language and basic scheme of the statute under which the administrative power is exercised, the nature and purpose for which the power is conferred, and the final effect of the exercise of that power."*

15. The Supreme Court in a very recent judgement in **Singrauli Super Thermal Power Station v. Ashwani Kumar Dubey and others** (Civil Appeal No.3856/2022 decided on July 5, 2023) once again examined in detail the principles of natural justice and after placing reliance on the judgement **in Madhyamam Broadcasting Limited (supra)** held as follows:

*15. A reading of the above, clearly indicates that the NGT is a judicial body and therefore exercises adjudicatory function. The very nature of an adjudicatory function would carry with it the requirement that principles of natural justice are complied with, particularly when there is an adversarial system of hearing of the cases before the Tribunal or for that matter before the Courts in India. The NGT though is a special adjudicatory body constituted by an Act of Parliament, nevertheless, the discharge of its function must be in accordance with law which would also include compliance with the principles of natural justice as envisaged in Section 19(1) of the Act.*

*16. In this context, it would be useful to refer to what is known as the 'official notice' doctrine, which is a device used in administrative procedure. Although an authority can rely upon materials familiar to it in its expert capacity without the need formally to introduce them in evidence, nevertheless, the parties ought to be informed of materials so noticed and be given an opportunity to explain or rebut them. The data on which an authority is acting must be apprised to the party against whom the data is to be used as such a party would then have an opportunity not only to refute it but also supplement, explain or give a different perspective to the facts upon which the authority relies. This has been explained by Schwartz in his work on Administrative Law. The aforesaid doctrine applies with greater force to a judicial / adjudicatory body.*

*Therefore, applying the aforesaid principle to the cases that come up before the NGT, if the NGT intends to rely upon an expert Committee report or any other relevant material that comes to its knowledge, it should disclose in advance to the party so as to give an opportunity for discussion and rebuttal. Thus, factual information which comes to the knowledge of NGT on the basis of the report of the Committee constituted by it, if to be relied upon by the NGT, then, the same must be disclosed to the parties for their response and a reasonable opportunity must be afforded to present their observations or comments on such a report to the Tribunal.*

*17. It is needless to observe that the experts' opinion is only by way of assistance in arriving at a final conclusion. But we find that in the instant case the report of the expert Committee as well as*

*the recommendations have been made the basis of the directions and such an approach is improper.*

16. The Division Bench of this Court in **S.R. Cold Storage v. Union of India and Others reported in 2022 SCC online (All) 550; {[2022] 448 ITR 37 (All)}** has also held as follows:

*"25. The first and foremost principle of natural justice is commonly known as audi alteram partem rule. It says that no one should be condemned unheard. Notice is the first limb of this principle. It must be precise and unambiguous. It should appraise the party determinatively the case he has to meet. Time given for the purpose should be adequate so as to enable him to make his representation. In the absence of a notice of the kind and reasonable opportunity, the order passed becomes wholly vitiated. Thus, it is but essential that a party should be put on notice of the case before any adverse order is passed against him. It is an approved rule of fair play.*

*26. The principles of natural justice are those rules which have been laid down by the courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, quasi-judicial and administrative authority while making an order affecting those rights. These rules are intended to prevent such authority from doing injustice. Even an administrative order which involves civil consequences must be consistent with the rules of natural justice.*

*27. The expression "civil consequences" encompasses infraction of not merely property or personal rights but of civil liberties, material deprivations, and non-pecuniary damages. In its wide umbrella comes everything that affects a citizen in his civil life.*

*28. Natural justice has been variously defined by different judges, for instance a duty to act fairly, the substantial requirements of justice, the natural sense of what is right and wrong, fundamental justice and fair-play in action. Over the years by a process of judicial interpretation two rules have been evolved as representing the principles of natural justice in judicial process, including therein quasi-judicial and administrative process. They constitute the basic elements of a fair hearing, having their roots in the innate sense of man for fair-play and justice which is not the preserve of any particular race or country but is shared in common by all men. The first rule is "nemo judex in causa sua" or "nemo debet esse judex in propria causa sua" that is no man shall be a judge in his own cause. The second rule is "audi alteram partem", that is, "hear the other side". A corollary has been deduced from the above two rules and particularly the audi alteram partem rule, i. e., "he who shall decide anything without the other side having been heard, although he may have said what is right, will not have been what is right" or in other words, as it is now expressed, "justice should not only be done but should manifestly be seen to be done". Natural justice is the essence of fair adjudication, deeply rooted in tradition and conscience, to be ranked as fundamental. The purpose of following the principles of natural justice is the prevention of miscarriage of justice."*

17. One may also refer to a judgement in **M/s Eastern Machine Bricks and Tiles Industries v. State of U.P. and Others, Neutral Citation No.-2024:AHC:3222** penned by one of us while sitting in Single Bench, wherein the Court, after examining

the umpteen judgements in relations to the principles of natural justice, held as follows:

*10. The common thread that runs across these judgments is that although the principle of audi alteram partem can evolve itself given the facts and circumstances of each case, its significance and applicability is universal. Audi alteram partem, which is a part of the doctrine of natural justice, finds its roots primarily in the constitutionally guaranteed ideal of equality. This principle ensures that no one is condemned, penalized, or deprived of their rights without a fair and reasonable opportunity of hearing. It acts as a safeguard against arbitrary decision-making, upholding the principle of due process while also providing a crucial foundation for just and equitable legal or administrative proceedings.*

*11. Furthermore, the significance of the principal of audi alteram partem is deeply entrenched in the foundational tenets of natural justice. The phrase, denoting "hear the other side," is emblematic of the sacrosanct right vested in individuals to be accorded a fair and impartial hearing before the adjudication of their rights or interests. This cardinal principle operates as a bulwark against arbitrariness and the capricious exercise of authority, mandating that decisions be reached only subsequent to a comprehensive and equitable deliberation of all relevant contentions. It is, in essence, the sine qua non of due process, standing as an unwavering sentinel against the potential tyranny of unchecked power. The judicious application of audi alteram partem not only upholds the sanctity of individual freedom but also fortifies the integrity of legal proceedings, fostering a milieu where justice is not merely meted out, but is perceived to be done through a conscientious consideration of diverse and adversarial perspectives.*

18. In light of the above, one may summarise the salient features that emerge from the examination of the above judgements –

a) *audi alteram partem* is a part of the doctrine of natural justice and requires a quasi judicial body to provide an opportunity of hearing to a person before fastening a liability upon him;

b) the above principles of *audi alteram partem* act as a safeguard against arbitrary decision making and provide for a crucial foundation for just equitable, legal and administrative proceedings;

c) decisions by a judicial authority should only be made after consideration and proper deliberation of all relevant contentions raised by the assessee and failure to do so would amount to decision making that is arbitrary and illegal in law;

d) documents that are relied upon by the department are necessarily required to be provided to a person upon whom a liability is being fastened so that, the person can deny and/or dispute the said documents. Non production of these documents to the assessee would amount to violation of the principles of natural justice unless the authority can show that the documents were not necessary and did not form part of the order passed wherein the liability was fastened on the assessee.

e) rules of natural justice, it is by now fairly well settled, are not rigid, immutable or embodied rules that may be capable of being put in straitjacket nor have the same been so evolved as to apply universally to all kind of domestic tribunals and enquiries.

f) a court examining a complaint based on violation of rules of natural justice is entitled to see whether the aggrieved party had indeed suffered any prejudice on account of such violation. To that extent there has been a shift from the earlier thought that even a technical infringement of the rules is sufficient to vitiate the action.

19. Coming to the present writ petition in hand, three factors may be highlighted by this Court. Firstly, the impugned order merely copies the reply provided by the petitioner which leads to a conclusion that there was non application of mind by the respondent authority. Secondly, in the reply to the show cause notice, certain documents and reports were sought for by the assessee, which had been relied upon by the authorities. However, without providing the same to the assessee, the authorities proceeded to impose the tax liability and penalty. Thirdly, the explanation provided by the petitioner with regard to the use of the raw materials in the process of the manufacture by the petitioner supported with opinions of the experts were simply brushed aside by the respondent authority, who did not even examine whether the said raw materials had been used in manufacture of the final products which were fabrics. Without having done so and without granting an opportunity of fair hearing to the petitioner, the liability that has been imposed upon the petitioner appears to be patently illegal and without any authority in law.

20. As discussed above, non production of certain documents to the petitioner that were relied upon by the authorities, coupled with the manner in which no proper opportunity of hearing was granted to the petitioner leads us to the conclusion that severe prejudice has been caused to the petitioner. Ergo, the impugned order cannot be sustained and is liable to be quashed and set aside.

21. Accordingly, the impugned order dated September 12, 2024 is quashed and set aside with a direction upon the respondent authorities to examine the fabrics, provide a copy of the report to the petitioner, grant an opportunity of hearing to the petitioner and thereafter pass a reasoned order in the same. We make it clear that with regard to E-way bills on which liability has also been fastened, an opportunity of hearing shall be granted to the petitioner.

22. With the above directions, the writ petition is allowed.

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**(2024) 11 ILRA 118**
**ORIGINAL JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 07.11.2024**

**BEFORE**

**THE HON'BLE MANISH MATHUR, J.**

Application U/S 482 No. 4826 of 2024

**Sanket Singh ...Applicant**
**Versus**
**State of U.P. & Anr. ...Opposite Parties**

**Counsel for the Applicant:**
Abhilasha Singh, Ashutosh Yadav, Shyam Lal

**Counsel for the Opposite Parties:**
G.A., Imran Ullah, Pankaj Kumar Mishra

**Criminal Law-The Code of Criminal Procedure,1973 - Section 233-** The scope and object of Section 233 is to advance the cause of substantial justice by providing the accused an opportunity for compelling the

production or attendance of any document or witness which is normally required to be allowed and can be rejected for reasons to be recorded only on the three grounds which are vexation or delay or defeating the ends of justice indicated under sub-section (3) of Section 233 Cr.P.C--- Impugned order is quashed--- Trial court shall ensure that process is issued for attendance of witnesses five and six indicated in the application no.91Kha as also production required in terms of application no. 92Kha/1.

**Petition partly allowed**. (E-15)

**List of Cases cited:**

1. Vivek Narayan Sharma & ors.(Demonetisation Case-5 J.) Vs U.O.I. & ors. (2023) 3 SCC 1

2. J. Jayalalithaa & ors.Vs St. of Karn. & ors.reported in 2014 (2) SCC 401

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

4. Munna Pandey Vs St. of Bihar passed in Criminal Appeal Nos.1271-1272 of 2018

5. Dr. Rajesh Talwar & anr.Vs C.B.I. & anr.2014 (1)SCC 628.

6. Enforcement Directorate Vs Kapil Wadhawan, (2024) 7 SCC 147

7. Anupam Singh Vs St. of U.P. Through Principal Secretary Home & anr. reported in 2024 SCC Online All 156

8. Angadh S/o. Rohidas Kadam, Rohidas S/o Vs The St. of Maharashtra & Madhukar reported in 2007(109)BOM. L.R.34,

9. Manoj Kumar Swami Vs St. of U.P. reported in 2006 CRI.L.J. 1781.

10. Anees Vs St. of Uttarakhand reported in 2018 STPL 6476 Uttarakhand

11. Natasha Singh Vs CBI (St.) reported in (2013) 5 SCC 741

12. Amarjeet @ Kaluwa Vs St. of U.P. & anr.passed in Application U/S 482 No.8463 of 2020,

13. Dharmendra Kumar @ Dhamma Vs St. of M.P. reported in (2024) 8 SCC 60

14. Krishan Kumar Pandey @ Kukkoo Pandey Vs The St. of U.P. passed in Criminal Misc. Case No.2109 of 2008

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

1. Heard Mr. Ashutosh Yadav, learned counsel for accused-applicant, Mr. Satyendra Tiwari, learned Additional Government Advocate appearing for opposite party no.1 State and Mr. Imran Ullah, learned counsel for opposite party no.2.

2. Application under Section 482 Cr.P.C. has been filed for modification of order dated 17.01.2024 passed in Sessions Trial No.401 of 2017, State versus Sanket & Ors., arising out of Case Crime No.1263 of 2016, under Sections 147, 148, 149, 307, 302, 506, 120B IPC and Section 7 Criminal Law Amendment Act, Police Station Quarsi, District Aligarh by directing summoning of witnesses no.1, 2 and 8 at the expense of State Government and not at the expense of accused-applicant. Further prayer for quashing part of the order dated 17.01.2024 passed in the aforesaid case so far as it rejects summoning of witnesses 3, 4, 5, 6 & 7 has been sought. Prayer has also been made for quashing of the said order dated 17.01.2024 whereby application no.92 Kha for summoning of record of affidavit verification photo from the record keeper of Photo Identification Centre of this Court has been made.

3. Learned counsel for accused-applicant submits that earlier the accused-

applicant had filed an application dated 03.07.2017 seeking verification of the Photo Identification Centre of this Court as well as records of the Shri Ram Hotel Allahabad. The said application was rejected by means of order dated 15.07.2017 which was challenged before this Court in application under Section 482 Cr.P.C. bearing No.26575 of 2017 in which initially interim order dated 05.09.2017 was passed but the application thereafter was dismissed vide order dated 07.05.2019 leaving it open to the applicant to lead such evidence at the appropriate stage with the observation that such a plea is not required to be considered since at that time the stage was only for framing of charge.

4. It is submitted that subsequently the applicant preferred another application dated 29.05.2019 before the trial court seeking a direction to the Photo Identification Centre of this Court, specifically the record in charge to keep the said record in safe custody till disposal of the case. The said application was allowed by means of order dated 19.10.2019. It is submitted that however despite allowing the said application, no information was sent by the office of trial court to the Photo Identification Centre of this Court leading to filing of another application by the applicant through jailor. The said application was rejected by means of order dated 11.08.2021 which was challenged by the applicant in an application under Section 482 Cr.P.C. bearing No.23012 of 2021, which is said to be still pending consideration.

5. It has also been submitted that the Photo Verification Centre of the High Court functions under the Bar Association which is a Private Society registered under the Societies Registration Act and therefore the documents issued by such a Centre would not come within purview of public document as envisaged under Section 74 of the Evidence Act due to which its corroboration is required.

6. It is submitted that during pendency of the earlier application under Section 482 Cr.P.C., the applicant filed the present applications dated 20.12.2023 with Application No.92Kha/1 pertaining to summoning of the In charge of the Photo Identification Centre alongwith records of 19.12.2016 and the Second Application Bearing No.91Kha/1 indicating a list of eight different witnesses sought to be summoned under Section 233 Cr.P.C.

7. It is these two applications which have been rejected by means of impugned order dated 17.01.2024.

8. Learned counsel submits that the incident as per first information report is said to have taken place on 19.12.2016 in which first information report was lodged and charge-sheet was also submitted on 19.03.2017 whereupon cognizance was taken on 30.03.2017 with charges being framed on 25.09.2019. It is submitted that due to interim protection granted earlier, the proceedings were hived off into Sessions Trial No.401 of 2017 and 401A of 2017 with Trial No.401A of 2017 pertaining to the applicant. It is further submitted that the prosecution witnesses have already been examined with evidence under Section 313 Cr.P.C. being recorded on 25.09.2023.

9. It is submitted that under Section 233 Cr.P.C., the applicants have a fundamental right to seek production of relevant documents and witnesses to prove their case of alibi that as on the date of

incident on 19.12.2016, the applicants had attended Court proceedings before this Court which was sought to be proved by means of relevant documents such as Photo Identification issued by the Photo Identification Centre of this Court. It is submitted that once the earlier application for keeping such records in safe custody was allowed, with only information not being remitted to the Centre, it was incumbent upon the trial court to have adhered to the initial directions and not to have rejected the subsequent applications for production of the Incharge and the said records.

10. It is submitted that similarly the eight defence witnesses sought to be produced by the applicant under Section 233 Cr.P.C. were for the purposes of proving and substantiating not only their alibi but the fallacies in the prosecution story. It is submitted that such a right is available to the accused under Section 233 Cr.P.C. read with Article 21 of the Constitution of India and therefore would be a fundamental right available to an accused-applicant particularly keeping in view the provisions of Section 233 Cr.P.C. which are couched in mandatory terms.

11. It is also submitted that the application under Section 233 Cr.P.C. could have been rejected only on account of three grounds indicated in the section viz vexation or delay or for defeating the ends of justice but a perusal of the impugned order would indicate that none of the three grounds have been taken by the trial court for rejecting the said application.

12. It is further submitted that even while allowing the summoning of witnesses no.1, 2 & 8 sought under Section 233 Cr.P.C., expenses thereof have been fastened upon the accused-applicant whereas for purposes of ensuring a fair trial, expenses were required to be fastened upon the State.

13. Learned counsel has placed reliance on judgments:

(i) ***Angadh S/o. Rohidas Kadam, Rohidas S/o versus The State of Maharashtra & Madhukar*** *reported in* ***2007(109)BOM. L.R.34,***

*(ii)* ***Smt. Sreeja versus Public Prosecutor*** *passed in* ***CRL. MC No.4909 of 2024, Crime No.248 /2022 of Angamali Police Station, Ernakulam,***

*(iii)* ***Anees versus State of Uttarakhand*** *reported in* ***2018 STPL 6476 Uttarakhand,***

*(iv)* ***Natasha Singh versus CBI (State)*** *reported in* ***(2013) 5 SCC 741,***

*(v)* ***Amarjeet @ Kaluwa versus State of U.P. & Anr.*** *passed in* ***Application U/S 482 No.8463 of 2020,***

*(vi)* ***Krishna Kumar Pandey @ Kukkoo Pandey versus The State of Uttar Pradesh*** *passed in* ***Criminal Misc. Case No.2109 of 2008,***

*(vii)* ***Mahe Aalam versus State of U.P.*** *reported in* ***2005 STPL 12541 Allahabad,***

*(viii)* ***Manoj Kumar Swami versus State of Uttar Pradesh*** *reported in* ***2006 CRI.L.J. 1781.***

14. Learned Additional Government Advocate appearing on behalf of State as well as learned counsel for opposite party no.2 have refuted submissions advanced by learned counsel for applicant with the submission that the provisions of Section 233 Cr.P.C. cannot be construed as a specific mandate binding the court concerned to the effect that any application filed by an accused under the said provision

is mandatorily required to be allowed. It is submitted that the stand of prosecution and the defence does not stand on equal footing and therefore exception under Section 233 Cr.P.C. has been carved circumscribing the powers of trial court under the said provision. It is submitted that in view of the provisions of Section 233 Cr.P.C., it would be incumbent upon an accused to indicate valid reasons for production of any additional document or witness under Section 233 Cr.P.C.

15. On merits as well, learned counsel for opposite parties have submitted that the production of witnesses 3 & 4 who are Police Officers has been sought by the opposite parties only to corroborate the information supplied to accused under the Right to Information Act, 2005. It is submitted that such documents having been supplied under statutory enactment come within the realm of public documents under Section 74 of the Evidence Act with presumption of genuineness subject to rebuttal under Section 79 of the Evidence Act and therefore there is no occasion for the accused to seek summoning of such witnesses.

16. It is also submitted that the applicant had earlier as well filed applications on 30.10.2023, 03.11.2023 and 01.12.2023 under Section 233 Cr.P.C. whereunder also applicants could have very well sought production of such documents and witnesses as has been done by means of the present applications. It is submitted that since such an opportunity has not been availed of by the accused thrice, it clearly indicates that the present applications have been filed for a vexatious purpose and only to delay the trial and therefore the order rejecting production of such documents and summoning of witnesses has been correctly passed.

17. Learned counsel for opposite party no.2 on the basis of instructions has made specific statement that the genuineness of the Photo Identity passes issued to the accused-applicant which was brought on record of the trial court are not being disputed and are in fact admitted. However the said admission does not extend to the contents of the said document.

18. With regard to the aspect of expenses fastened upon the applicants, learned counsel for opposite parties submit that such a power is to be exercised under Section 233 Cr.P.C. read with Section 312 Cr.P.C. and since it is the accused-applicant who is seeking such witnesses, the trial court has rightly fastened the aspect of expenses upon the accused-applicant.

19. Upon consideration of submissions advanced by learned counsel for parties and perusal of material on record, it is evident that the aspect of validity of impugned orders are required to be adjudged in terms of provisions of Section 233 Cr.P.C. which are as follows:

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

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

*(3) If the accused applies for the issue of any process for compelling the attendance of any witness or the production*

*of any document or thing, the Judge shall issue such process unless he considers, for reasons to be recorded, that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice."*

20. The wordings of Section 233 (3) Cr.P.C. clearly indicates a positive obligation upon the Court for compelling attendance of any witness or production of any document or thing in case the accused, applies for issue of process for compelling such attendance or production. However such a positive direction is circumscribed by three grounds viz vexation or delay or defeating the ends of justice on which the trial court would be entitled to reject such a plea, for reasons to be recorded.

21. With regard to statutory interpretation, Hon'ble the Supreme Court in the case of ***Vivek Narayan Sharma and Ors. (Demonetisation Case-5 J.) v. Union of India and Ors., (2023) 3 SCC 1*** has specifically held that in case of statutory interpretation, a purposive interpretation is required to be given keeping in view the wordings of a particular enactment to further the purpose of such a provision having been incorporated in the Act. The relevant paragraph is as follows:

*"148. It is thus clear that it is a settled principle that the modern approach of interpretation is a pragmatic one, and not pedantic. An interpretation which advances the purpose of the Act and which ensures its smooth and harmonious working must be chosen and the other which leads to absurdity, or confusion, or friction, or contradiction and conflict between its various provisions, or undermines, or tends to defeat or destroy the basic scheme and purpose of the enactment must be eschewed. The primary and foremost task of the Court in interpreting a statute is to gather the intention of the legislature, actual or imputed. Having ascertained the intention, it is the duty of the Court to strive to so interpret the statute as to promote or advance the object and purpose of the enactment. For this purpose, where necessary, the Court may even depart from the rule that plain words should be interpreted according to their plain meaning. There need be no meek and mute submission to the plainness of the language. To avoid patent injustice, anomaly or absurdity or to avoid invalidation of a law, the court would be justified in departing from the so-called golden rule of construction so as to give effect to the object and purpose of the enactment. Ascertainment of legislative intent is the basic rule of statutory construction."*

22. Upon applicability of aforesaid judgment in the facts and circumstances of the case, it is evident from the wordings of Section 233 (3) Cr.P.C. that the provision is clearly meant for beneficial purpose for the attendance of any witnesses or production of any document sought by the accused-applicant. Such a positive enactment is keeping in view the purpose of a fair trial as required under Article 21 of the Constitution of India.

23. The concept of fair trial has already been explained and enunciated upon by Supreme Court in the case of ***J. Jayalalithaa and Ors. versus State of Karnataka and Ors.*** reported in ***2014 (2) SCC 401*** in the following manner:

*"28. Fair trial is the main object of criminal procedure and such fairness should not be hampered or threatened in any manner. Fair trial entails the interests*

*of the accused, the victim and of the society. Thus, fair trial must be accorded to every accused in the spirit of the right to life and personal liberty and the accused must get a free and fair, just and reasonable trial on the charge imputed in a criminal case. Any breach or violation of public rights and duties adversely affects the community as a whole and it becomes harmful to the society in general. In all circumstances, the courts have a duty to maintain public confidence in the administration of justice and such duty is to vindicate and uphold the "majesty of the law" and the courts cannot turn a blind eye to vexatious or oppressive conduct that occurs in relation to criminal proceedings.*

*29. Denial of a fair trial is as much injustice to the accused as is to the victim and the society. It necessarily requires a trial before an impartial Judge, a fair prosecutor and an atmosphere of judicial calm. Since the object of the trial is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not a bout over technicalities and must be conducted under such rules as will protect the innocent and punish the guilty. Justice should not only be done but should be seem to have been done. Therefore, free and fair trial is a sine qua non of Article 21 of the Constitution. Right to get a fair trial is not only a basic fundamental right but a human right also. Therefore, any hindrance in a fair trial could be violative of Article 14 of the Constitution. "No trial can be allowed to prolong indefinitely due to the lethargy of the prosecuting agency or the State machinery and that is the raison d'tre in prescribing the time frame" for conclusion of the trial.*

*30. Article 12 of the Universal Declaration of Human Rights provides for the right to a fair trial what is enshrined in Article 21 of our Constitution. Therefore, fair trial is the heart of criminal jurisprudence and, in a way, an important facet of a democratic polity and is governed by the rule of law. Denial of fair trial is crucifixion of human rights."*

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

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

25. The said proposition has been reiterated in the case of ***Munna Pandey versus State of Bihar*** passed in Criminal Appeal Nos.1271-1272 of 2018 & ***Dr. Rajesh Talwar & Anr. versus C.B.I. & Anr. 2014 (1)SCC 628.***

26. The Supreme Court in the case of ***Enforcement Directorate v. Kapil Wadhawan, (2024) 7 SCC 147*** has clearly enunciated the law that provisions of Cr.P.C. are to be seen in the context of advancement of justice particularly in case of defence setup by the accused in order to ensure a fair trial.

27. The concept of provisions of Section 233 Cr.P.C. therefore assumes significance, as per which an application thereunder can be rejected only in case the Court concerned, for reasons to be recorded, indicates that it has been made

for the purpose of vexation or delay or for defeating the ends of justice. The specific wordings of Section 233 Cr.P.C. therefore do not envisage rejection of such an application on any other ground. The gist of the said provision particularly sub-section (3) thereof clearly imposes an obligation upon the Court to allow such an application positively except only on the grounds indicated hereinabove. It therefore appears that provision of Section 233 Cr.P.C. are clearly in favour of allowing such an application being preferred by the accused.

28. The provision of Section 233 Cr.P.C. has also been considered by the Coordinate Bench of this Court in the case of ***Anupam Singh versus State of U.P. Through Principal Secretary Home and Anr.*** reported in ***2024 SCC Online All 156*** reiterating the fact that an application under Section 233 Cr.P.C. cannot be refused on the grounds which are not covered by three excluding clauses in the following manner:

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

29. The said aspect has again been reiterated by another Coordinate Bench of this Court in the case of ***Manoj Kumar Swami*** (supra).

30. The said concept has also been considered by High Court of Bombay in the case of ***Angad*** (supra) as follows:

*"13. Then the question comes as to what is the scope of Section 233 of Cr.P.C. A bare perusal of Sub-section 3 of Section 233 would reveal that when accused applies for the issue of any process for compelling the attendance of any witness or the production of any document or thing, the Judge shall issue such process unless he considers, for reasons to be recorded, that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice. It can thus be clearly seen that when an accused exercises his right under Sub-section 3 of Section 233 for compelling the attendance of any witness or production of any document, the learned Magistrate can refuse the said request only on three grounds: (i) vexation, (ii) delay, and (iii) defeating the ends of justice. Moreover, the Magistrate is required to record his reasons for refusing the request. A bare perusal of the said Section would reveal that except those three grounds, the request cannot be turned down on any other ground."*

31. Similarly the High Court of Kerla at Arnakulam has also adverted to the aforesaid provision and has held that when the accused submits a list of witnesses, is not open for the Court to pick and choose the witnesses and is bestowed with the power to refuse to summon such a witness only on the exclusion clauses indicated in Section 233(3) Cr.P.C. It has also been held that it is not proper for a trial court to conclude during the middle of trial that some witnesses would not advance the case of accused since such a conclusion can be

drawn only once the said witnesses have been examined.

32. The High Court of Uttarakhand in the case of ***Anees*** (supra) had also held that non-compliance of mandatory provision prescribed by Section 233 Cr.P.C. would be a serious lapse causing prejudice to the accused and in such circumstances, the conviction and sentence may not stand the test of law.

33. The Supreme Court in the case of ***Natasha Singh*** (supra) although considering provisions of Section 311 Cr.P.C has also adverted to the concept of fair trial as being the main object of criminal procedure while casting a duty on the court to ensure that such fairness is not hampered or threatened in any manner since it entailed interest of accused and therefore a grant of fair and proper opportunity to the accused is required to be ensured as his constitutional and human right. It has also been held that trial court cannot prejudge evidence of the witness sought to be examined by an accused since it would cause grave and material prejudice to the accused with regard to defence and would therefore the tantamount to flagrant violation of principles of law. The relevant portions of judgment are as follows:

*"15. The scope and object of the provision is to enable the court to determine the truth and to render a just decision after discovering all relevant facts and obtaining proper proof of such facts, to arrive at a just decision of the case. Power must be exercised judiciously and not capriciously or arbitrarily, as any improper or capricious exercise of such power may lead to undesirable results. An application under Section 311 CrPC must not be allowed only to fill up a lacuna in the case of the prosecution, or of the defence, or to the disadvantage of the accused, or to cause serious prejudice to the defence of the accused, or to give an unfair advantage to the opposite party. Further, the additional evidence must not be received as a disguise for retrial, or to change the nature of the case against either of the parties. Such a power must be exercised, provided that the evidence that is likely to be tendered by a witness, is germane to the issue involved. An opportunity of rebuttal however, must be given to the other party. The power conferred under Section 311 CrPC must therefore, be invoked by the court only in order to meet the ends of justice, for strong and valid reasons, and the same must be exercised with great caution and circumspection. The very use of words such as 'any court', 'at any stage', or 'or any enquiry, trial or other proceedings', 'any person' and 'any such person' clearly spells out that the provisions of this section have been expressed in the widest possible terms, and do not limit the discretion of the court in any way. There is thus no escape if the fresh evidence to be obtained is essential to the just decision of the case. The determinative factor should therefore be, whether the summoning/recalling of the said witness is in fact, essential to the just decision of the case.*

*20. Undoubtedly, an application filed under Section 311 CrPC must be allowed if fresh evidence is being produced to facilitate a just decision, however, in the instant case, the learned trial court prejudged the evidence of the witness sought to be examined by the appellant, and thereby caused grave and material prejudice to the appellant as regards her defence, which tantamounts to a flagrant violation of the principles of law governing the production of such evidence in keeping*

*with the provisions of Section 311 CrPC. By doing so, the trial court reached the conclusion that the production of such evidence by the defence was not essential to facilitate a just decision of the case. Such an assumption is wholly misconceived, and is not tenable in law as the accused has every right to adduce evidence in rebuttal of the evidence brought on record by the prosecution. The court must examine whether such additional evidence is necessary to facilitate a just and proper decision of the case. The examination of the handwriting expert may therefore be necessary to rebut the evidence of Rabi Lal Thapa (PW 40), and a request made for his examination ought not to have been rejected on the sole ground that the opinion of the handwriting expert would not be conclusive. In such a situation, the only issue that ought to have been considered by the courts below, is whether the evidence proposed to be adduced was relevant or not. Identical is the position regarding the panchnama witness, and the court is justified in weighing evidence, only and only once the same has been laid before it and brought on record. Mr B.B. Sharma, thus, may be in a position to depose with respect to whether the documents alleged to have been found, to have been seized, were actually recovered or not, and therefore, from the point of view of the appellant, his examination might prove to be essential and imperative for facilitating a just decision of the case."*

34. Although the said judgment pertains to Section 311 Cr.P.C. but in the considered opinion of this Court, the aforesaid judgments can be read for the purpose of determining power of trial court with regard to summoning or re-examination of witnesses under Section 233 Cr.P.C. as well, since both provisions pertain to summoning of material witnesses.

35. Another Coordinate Bench of this Court while considering provisions of Section 311 Cr.P.C. in the case of ***Amarjeet @ Kaluwa*** (supra) has also held that the accused has a right to summon any evidence/witness which may be relevant for proper appreciation of prosecution evidence and to substantiate his defence.

36. Upon encapsulation of the aforesaid judgments, it is clearly discernible that the scope and object of Section 233 Cr.P.C. is to advance the cause of substantial justice by providing the accused an opportunity for compelling the production or attendance of any document or witness which is normally required to be allowed and can be rejected for reasons to be recorded only on the three grounds indicated under sub-section (3) of Section 233 Cr.P.C.

37. In the background of aforesaid enunciation of law, the application preferred under the said provision by the applicant is required to be seen.

38. The application no.91Kha/1 indicates a list of eight different witnesses sought by the accused to be summoned. Out of the said eight persons, trial court has granted summoning with regard to three of the witnesses at serial no.1, 2 and 8 while rejecting the rest.

39. It has been submitted that persons required to be summoned as indicated in the application at serial no.3 and 4 are the S.P. City and the C.O. City who require to be examined by the accused in order to corroborate the information provided to accused-applicant under the Right to

Information Act. With regard to summoning of such witnesses, it is not the case of the applicant that the said persons are eye witnesses to the incident. The information provided to the applicant under Right to Information Act may come within definition of a public document under Section 74 of the Evidence Act and may therefore attract the provision of Section 79 of the Evidence Act.

40. In such circumstances, the application pertaining to said persons are found by this Court to be vexatious having been made only for the purposes of delaying the trial. With regard to aforesaid witnesses, the finding recorded by trial court is therefore upheld.

41. So far as witnesses 5 & 6 of the application being Yogesh Mahajan & Monu Mahajan is concerned production of such witnesses has been refused by trial court on the ground that they are not relevant witnesses for the purpose of establishing proceedings recorded by the CC TV Camera.

42. In the considered opinion of this Court, rejection of summoning of said two witnesses clearly goes beyond the ground indicated in Section 233(3) Cr.P.C. since at this stage, trial Court is not required to consider whether their defence would be material or not and such a satisfaction can be garnered only once the said witnesses have deposed.

43. So far as production of witness No.7 being the Branch Manager/ CPIO of the State Bank of India/Branch Manager D.S. College is concerned, this Court also finds that production of such witness may be only to fill in lacuna of the defence instead of corroborating any particular evidence or for substantiation of the defence case. It is settled law that by means of an application under Section 233 Cr.P.C., lacuna in the defence case cannot be sought to be fulfilled or for creation of evidence. In view thereof, the production for said witness no.7 also is found to be vexatious and would lead to delay in conclusion of trial. The rejection by trial court recorded for summoning of said witness is therefore upheld.

44. So far as the application no.92kha/1 pertaining to summoning of the In-charge of Photo Identification Centre along with record is concerned, it is evident from material on record that such verification is being sought by the applicant ever since 03.07.2017 and subsequent to initial rejection thereof, the same was thereafter allowed by means of order dated 19.10.2019. It therefore does not stand to reason as to why the earlier order dated 19.10.2019 passed by the trial court itself should not have been followed through by the trial court. It is also relevant that the said records are kept under custody of the Bar Association concerned and therefore may not come within purview of Sections 74 and 79 of the Evidence Act due to which their corroboration may be required. It is also relevant that learned counsel for opposite party no.2 has clearly on the basis of instruction admitted the genuineness of said documents but has however expressed reservation with regard to contents of said documents. Therefore the admission with regard to the said documents is not unequivocal.

45. It is also evident that production of such documents is being sought by the accused in order to substantiate and corroborate his plea of alibi.

46. With regard to the plea of alibi, Hon'ble the Supreme Court in the case of

***Dharmendra Kumar Alias Dhamma versus State of Madhya Pradesh*** reported in ***(2024) 8 SCC 60*** has enunciated as follows:

*"50.There is no gainsaying that whosoever pleads alibi in contrast and derogation of the eyewitness version, is under cumbrous onus to prove absence from the scene and time of crime. The appellant not only failed to raise this defence but also did not adduce any evidence in support thereof. Taking into consideration the cumulative effect of all these factors, we have no reason to doubt that the appellant was not only present at the scene of crime, but he actively participated also in the occurrence and gave one of the fatal blows to Tillu (deceased)."*

47. It is thus evident that since the applicant is pleading alibi, he should be granted ample opportunity to discharge the onerous burden cast upon him particularly in view of the fact that production of such document has been sought by him ever since 2017 and was also allowed earlier.

48. The aforesaid application has also been rejected, in view of earlier order dated 11.08.2021 on the ground that the accused cannot use provisions of Section 233 Cr.P.C. to garner evidence as also placing reliance on order dated 07.05.2019 passed by this Court an application under section 482 Cr.P.C. bearing no.26577 of 2017 which however only indicates that the applicant was granted liberty to lead such evidence at the appropriate stage. Application has also been rejected on the ground that the applicant himself should have made an effort to obtain such records.

49. The reasoning indicated by trial court while rejecting the said application No.92Kha/1 is patently erroneous since it also does not conform to rejection on any of three grounds indicated in Section 233(3) Cr.P.C. for such rejection. It is evident from record that the original pass issued by Photo Identification Centre of this Court has already been brought on record of the trial court which therefore may be required to be corroborated by production of original records from the Centre which as indicated herein-above may not come within definition of Section 74 of the Evidence Act.

50. In view of aforesaid facts and discussion, it is evident that the trial court has erred in rejecting the application No.92Kha/1 as well as a part of application No.91kha/1.

51. So far as the aspect of expenses is concerned, burden for which has been cast upon applicant himself, coordinate benches of this Court in the case of ***Krishan Kumar Pandey alias Kukkoo Pandey versus The State of Uttar Pradesh*** passed in Criminal Misc. Case No.2109 of 2008 have clearly enunciated the law after considering Section 312 Cr.P.C. is as follows:

"Thus, from a study of the aforesaid provisions relating to the summoning of defence witness it is clear that as far as the Sessions Trial is concerned the provisions of the Code stands on the same footing in respect of summoning the prosecution witness viz-a-viz defence witness and there is no difference. In other words like prosecution witnesses the defence witness in the sessions case are also to be summoned at the expenses of the State. The only rider is that such a request made by defence can be rejected if the learned Sessions Judge finds that the request has been made for the

purpose of vexation or delay or defeating the ends of justice, A Sessions court may also take recourse in this regard to the enabling provision envisaged in Section 312 Cr.P.C. quoted herein before."

52. A perusal of judgment rendered by Hon'ble the Supreme Court in the case of ***Dr. Rajesh Talwar & Anr. versus Central Bureau of Investigation & Anr.*** reported in ***(2014)1 SCC 628*** relied upon by learned counsel for opposite parties also does not indicate any contrary view being taken. However it only indicates that criminal Courts are not obliged to accede to the request made by accused. However even the said judgment indicates that trial courts are bound by terms of Section 233 (3) Cr.P.C. to refuse such a request only on the ground indicated therein.

53. It is a factor required to be kept in mind that the applicant is facing charges under Sections 302 and 307 IPC which carry the maximum sentence of the death penalty. In such circumstances, widest amplitude is required to be given to the accused in order to substantiate his defence. The seriousness of charge imputed against the applicant cannot be emphasized enough and therefore he would have inherent right under Article 21 of the Constitution of India for his applications to succeed to the extent indicated herein-above.

54. In view of aforesaid facts and circumstances and discussion made, the impugned order dated 17.01.2024 so far as it rejects application no.92/kha and to the extent it rejects application No.91Kha is hereby quashed with regard to the witnesses five, six and for summoning of the record of affidavit of Photo Identification Centre.

55. Trial court shall ensure that process is issued for attendance of witnesses five and six indicated in the application no.91Kha as also production required in terms of application no. 92Kha/1. Expenses for the same shall be born by the State.

56. Considering aforesaid facts and circumstances, the application under Section 482 Cr.P.C. is ***partially allowed*** to the aforesaid extent.

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**(2024) 11 ILRA 130**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 11.11.2024**

**BEFORE**

**THE HON'BLE NEERAJ TIWARI, J.**

Matters Under Article 227 No. 11516 of 2024

**National Highway Authority of India & Anr. ...Petitioners**

**Versus**

**Jagpal Singh & Ors. ...Respondents**

**Counsel for the Petitioner:**
Shiv Kumar Singh

**Counsel for the Respondents:**
Devansh Misra, C.S.C., Devesh Kumar Verma

**Civil Law-The Arbitration and Conciliation Act, 1996 - Section 4 & 36-** Jurisdiction for filing execution case lies with the Judgeship of Kanpur or Etawah---Dispute is arising out of acquirement of land of petitioners at District Etawah, meaning thereby, property and assets of the petitioners is situated at there, therefore, even if the office of petitioners is at Kanpur or arbitration award was pronounced at Kanpur, that would make no difference in filing of execution proceeding at Etawah in light of interpretation made by the Hon'ble Apex Court and the provision of CPC as well as Act, 1996 occupying the field--- Undisputedly against an award given at Kanpur, petitioners themselves have preferred appeal under Section 34 of the of the Act, 1996 before District Judge, Etawah,

therefore, petitioners acquiesce their right and their objection is certainly barred by Section 4 of the Act. (E-15)

**List of Cases cited:**

1. Ge Money Financial Services Ltd., New Delhi Vs Mohd. Azaz & anr.): 2013 SCC Online AII 13365

2. Sundaram Finance Ltd. Vs Abdul Samad and Ors.: AIR 2018 SC 956

3. Matter Under Article 227 No. 2704 of 2023 (Bharat Petroleum Corp. Ltd. Mumbai Thru. Territory Manager, Retail Territory-Gonda Vs Anoop Kumar Modi)

4. Cheran Properties Ltd. Vs Kasturi and Sons Ltd. & ors.: (2018) 16 SCC 413

5. Matter Under Article 227 No. 3384 of 2023 (Madhyanchal Vidyut Vitran Nigam Ltd. Thru. Managing Director Vs M/S Shashi Cable Thru. Its Authorized Signatory.

(Delivered by Hon'ble Neeraj Tiwari, J.)

1. Heard Sri Shiv Kumar Singh, learned counsel for the petitioners, Sri Devansh Misra, learned counsel for the respondent Nos. 1 & 2 and learned Standing Counsel for the respondent No. 3.

2. Brief facts of the case are that land of respondent Nos. 1 & 2 has been acquired for widening of National Highway No. 2 at Maneyamau, Tehsil- Etawah, District-Etawah and in light of Section 3G(2) of the National Highways Act, 1956(hereinafter, referred to as, 'Act, 1956'), amount of compensation has been determined. Section 3G(5) of the Act, 1956 also provides that if either of the parties are not satisfied with the determination of the amount, on an application by either of the parties the amount shall be determined by the arbitrator to be appointed by the Central Government. In the present case, Additional District Magistrate, Etawah vide order dated 23.12.2016 has fixed the amount of compensation. Against that, petitioners filed arbitration application under Section 3G(5) of the Act, 1956 before the Additional Commissioner, Administration, Kanpur Division, Kanpur, who is the competent authority appointed by the Central Government. Ultimately, the final award was passed vide order dated 05.08.2019. Petitioners also filed restoration application along with delay condonation application dated 17.10.2019 against the order dated 05.08.2019 and the same was rejected vide order dated 06.01.2022. Against the said award, petitioners have preferred Civil Misc. Case No. 64 of 2022 under Section 34(3) of Arbitration and Conciliation Act, 1996(hereinafter, referred to as, 'Act, 1996'), which was also rejected vide order dated 18.07.2023 by the Additional District Judge(POCSO Act), Etawah. Against the order dated 18.07.2023, petitioners preferred Appeal Under Section 37 of Arbitration and Conciliation Act 1996 Defective No. 652 of 2023, delay was condoned vide order dated 21.03.2024 and direction was issued to allot regular number to Appeal. It is undisputed between the parties that till date, no stay or interim order has been passed upon the aforesaid appeal filed by the petitioner.

3. Now, respondent Nos. 1 and 2 have preferred execution of award before the District Judge, Etawah, which was transferred to Additional District Judge, Etawah and numbered as Execution Case No. 46 of 2023. In the said case, petitioner has filed objection, numbered as 17Ga raising the issue of jurisdiction of the court, which was objected by the respondent Nos. 2 & 3 by filing rebuttal numbered as Paper No. 18Ga. The objection of petitioners has

been rejected vide order dated 05.08.2024. Hence present petition.

4. Sri, Shiv Kumar Singh, learned counsel for the petitioners submitted that office of respondent No. 1 is situated at Kanpur and from there it carries its business. Further, arbitration also took place at Kanpur, therefore, Section 36 of the Act, 1996 and provisions of CPC would by applicable and jurisdiction of execution case shall lie with the District Judge, Kanpur.

5. In support of his contention, he place reliance upon the judgment of Hon'ble Apex Court in the matter of ***Sundaram Finance Limited Vs. Abdul Samad and Ors.: AIR 2018 SC 956,*** judgment of this Court in the matter of ***Ge Money Financial Services Ltd., New Delhi Vs. Mohd. Azaz & Anr): 2013 SCC Online AII 13365*** and judgment of High Court of Delhi in the matter of ***Daelim Industrial Co. Ltd. Vs. Numaligarh Refinery Ltd.: MANU/DE/1316/2009.***

6. Per contra, Sri Devansh Misra, learned counsel for the respondent Nos. 1 & 2 vehemently opposed the submission raised by learned counsel for the petitioners and submitted that against the said award, petitioners have preferred Civil Misc. case No. 64 of 2022 under Section 34(3) of the Act, 1996, which was rejected vide order dated 18.07.2023. Once he has filed appeal before the District Judge, Etawah under Section 34 of the Act 1996, he acquiesces the jurisdiction with the District Judge, Etawah, therefore, in light of Section 4 of the Act, 1996, now he has waived of his right to objection. He further submitted that the very same issue was before the Hon'ble Apex Court and many other Courts. He also pointed out that in light of Section 32 of the Act, 1996, arbitral proceeding shall be terminated by the final arbitral award or by an order of the arbitral tribunal under sub-section(2). In the present case, undisputedly, arbitral proceeding has been terminated after pronouncement of award, therefore, Section 42 of the Act, 1996 about the jurisdiction would not be applicable for filing of execution proceeding. He next submitted that so far as Section 36 of the Act 1996 is concerned, it is a deeming provision in light of other provisions of the Act, 1996 and the interpretation made by the court, therefore, provision of CPC would not be applicable in the present case.

7. In support of his contention, he placed reliance upon the judgment of Hon'ble Apex Court in the matters of ***Sundaram Finance Limited(Supra) & Cheran Properties Limited Vs. Kasturi and Sons Limited and Others: (2018) 16 SCC 413***, and judgment of this Court in the matters of ***Ge Money Financial Services Ltd.(Supra), Matter Under Article 227 No. 2704 of 2023 (Bharat Petroleum Corporation Ltd. Mumbai Thru. Territory Manager, Retail Territory-Gonda Vs. Anoop Kumar Modi), Matter Under Article 227 No. 3384 of 2023 (Madhyanchal Vidyut Vitran Nigam Ltd. Thru. Managing Director Vs. M/S Shashi Cable Thru. Its Authorized Signatory.***

8. I have considered the submission so advanced by learned counsel for the parties and perused the record as well as judgments relied upon.

9. The facts of the case are undisputed and the only issue before the Court is, as to whether jurisdiction for filing execution case lies with the Judgship of Kanpur or Etawah, which is a pure legal question, therefore, with the consent of the counsel

for the parties, petition is being decided at the admission stage itself without calling for the counter.

10. Allahabad High Court in the matter of ***Ge Money Financial Services Ltd.(Supra)*** has taken the view that award can be executed by the court, in whose jurisdiction judgment debtor resides, carries on business or his property is situated. For execution of arbitral award, issue of jurisdiction has travelled before different High Courts and diverse views have been taken by the Courts. One view is that, transfer of decree is first to be obtained before filing of execution before the court, where the assets are located and another view is that execution for award can be filed before the court, where the assets of the judgment debtor are located and for that, no transfer decree is required. Ultimately, the matter went up to Hon'ble Supreme Court in the matter of ***Sundaram Finance Limited (Supra).*** Relevant paragraph of the said judgment are being quoted hereinbelow:

*"1. The divergence of legal opinion of different High Courts on the 1question as to whether an award under the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the 'said Act') is required to be first filed in the court having jurisdiction over the arbitration proceedings for execution and then to obtain transfer of the decree or whether the award can be straightway filed and executed in the Court where the assets are located is required to be settled in the present appeal.*

***The Conflicting Views:***

***A. The transfer of decree should first be obtained before filing the execution petition before the Court where the assets are located:***

***B. An award is to be enforced in accordance with the provisions of the said Code in the same manner as if it were a decree of the Court as per Section 36 of the said Act does not imply that the award is a decree of a particular court and it is only a fiction. Thus, the award can be filed for execution before the court where the assets of the judgment debtor are located:***

***Our View:***

*6. In order to appreciate the controversy, we would first like to deal with the provisions of the said Code and the said Act.*

*7. Part II of the said Code deals with execution proceedings. Section 37 of the said Code defines the 'Court', which passed the decree. Section 38 of the said Code provides as to by which court the decree would be executed and reads as under:*

***"38. Court by which decree may be executed.*** *– Adecree may be executed either by the Court which passed it, or by the Court to which it is sent for execution."*

*8. Section 39 of the said Code provides for transfer of decree and reads as under:*

***"39. Transfer of decree.*** *– (1)The Court which passed a decree may, on the application of the decree-holder, send it for execution to another Court [of competent jurisdiction],-*

*(a) if the person against whom the decree is passed actually and voluntarily resides or carries on business, or personally works for gain, within the local limits of the jurisdiction of such other Court, or*

*(b) if such person has no property within the local limits of the jurisdiction of the Court which passed the decree sufficient to satisfy such decree and has*

*property within the local limits of the jurisdiction of such other Court, or*

*(c) if the decree directs the sale or delivery of immovable property situate outside the local limits of the jurisdiction of the Court which passed it, or*

*(d) if the Court which passed the decree considers for any other reason, which it shall record in writing, that the decree should be executed by such other Court.*

*(2) The Court which passed the decree may of its own motion send it for execution to any subordinate Court of competent jurisdiction.*

*[(3) For the purposes of this section, a Court shall be deemed to be a Court of competent jurisdiction if, at the time of making the application for the transfer of decree to it, such Court would have jurisdiction to try the suit in which such decree was passed.]*

*[(4) Nothing in this section shall be deemed to authorise the Court which passed a decree to execute such decree against any person or property outside the local limits of its jurisdiction.]"*

*9. One of the relevant provisions, the effect of which has not been really discussed in any of the judgments referred to aforesaid is Section 46 of the said Code which defines Precepts as under:*

*"46.* ***Precepts****. – (1)Upon the application of the decree-holder the Court which passed the decree may, whenever it thinks fit, issue a precept to any other Court which would be competent to execute such decree to attach any property belonging to the judgment-debtor and specified in the precept.*

*(2) The Court to which a precept is sent shall proceed to attach the property in the manner prescribed in regard to the attachment of property in execution of a decree:*

*Provided that no attachment under a precept shall continue for more than two months unless the period of attachment is extended by an order of the Court which passed the decree or unless before the determination of such attachment the decree has been transferred to the Court by which the attachment has been made and the decree-holder has applied for an order for the sale of such property.*

*10.The relevance of the aforesaid provision is that the application of the decree holder is made to the Court which passed the decree, which issues the precepts to any other Court competent to execute the said decree. As noticed, the expression "the Court which passed the decree" is as per Section 37 of the said Code. We may note at this stage itself that in the case of an award there is no decree passed but the award itself is executed as a decree by fiction. The provisions of the said Act traverse a different path from the Arbitration Act, 1940, which required an award made to be filed in Court and a decree to be passed thereon whereupon it would be executable.*

*11. Now turning to the provisions of Order XXI of the said Code, which deals with execution of decrees and orders. In case a Court desires that its own decree is to be executed by another court, the manner for doing so is provided by Rule 6, which reads as under:*

***"21 – Execution of Decrees and Orders***

*xxxx xxxx xxxx xxxx xxxx*

*6. Procedure where court desires that its own decree shall be executed by another court.- The court sending a decree for execution shall send—*

*(a) a copy of the decree;*

*(b) a certificate setting forth that satisfaction of the decree has not been*

*obtained by execution within the jurisdiction of the court by which it was passed, or, where the decree has been executed in part, the extent to which satisfaction has been obtained and what part of the decree remains unsatisfied; and*

*(c) a copy of any order for the execution of the decree, or, if no such order has been made, a certificate to that effect.*

*12.The manner of presentation of an application is contained in Rule 11(2) of Order XXI, which reads as under:*

***"21– Execution of Decrees and Orders***

*xxxx xxxx xxxx xxxx xxxx*

***11. (2) Written application****—Save as otherwise provided by sub-rule (1), every application for the execution of a decree shall be in writing, signed and verified by the applicant or by some other person proved to the satisfaction of the court to be acquainted with the facts of the case, and shall contain in a tabular form the following particulars, namely:—*

*(a) the number of the suit;*

*(b) the names of the parties;*

*(c) the date of the decree; (*

*d) whether any appeal has been preferred from the decree;*

*(e) whether any, and (if any) what, payment or other adjustment of the matter in controversy has been made between the parties subsequently to the decree;*

*(f) whether any, and (if any) what, previous applications have been made for the execution of the decree, the dates of such applications and their results;*

*(g) the amount with interest (if any) due upon the decree, or other relief granted thereby, together with particulars of any cross decree, whether passed before or after the date of the decree sought to be executed;*

*(h) the amount of the costs (if any) awarded;*

*(i) the name of the person against whom execution of the decree is sought; and*

*(j)the mode in which the assistance of the court is required, whether—*

*(i) by the delivery of any property specifically decreed;*

*(ii) by the attachment, or by the attachment and sale, or by the sale without attachment, of any property;*

*(iii) by the arrest and detention in prison of any person;*

*(iv) by the appointment of a receiver;*

*(v) otherwise, as the nature of the relief granted may require."*

*13.A perusal of the aforesaid shows that what is sought to be disclosed is that the details like the number of suits, appeal against the decree, etc. find a place, which really does not have a relevance to the fiction of an award to be treated as a decree of the Court for purposes of execution.*

*14.We would now like to refer to the provisions of the said Act, more specifically Section 36(1), which deals with the enforcement of the award:*

***"36. Enforcement****. – (1) Where the time for making an application to set aside the arbitral award under section 34 has expired, then, subject to the provisions of sub-section (2), such award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908 (5 to 1908), in the same manner as if it were a decree of the court."*

*The aforesaid provision would show that an award is to be enforced in accordance with the provisions of the said code in the same manner as if it were a decree. It is, thus, the enforcement*

*mechanism, which is akin to the enforcement of a decree but the award itself is not a decree of the civil court as no decree whatsoever is passed by the civil court. It is the arbitral tribunal, which renders an award and the tribunal does not have the power of execution of a decree. For the purposes of execution of a decree the award is to be enforced in the same manner as if it was a decree under the said Code.*

*15. Section 2(e) of the said Act defines 'Court' as under:*

*"2. Definitions.*

*……. xxxx xxxx xxxx xxxx xxxx*

*(e) "**court**" means –*

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

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

*16.The line of reasoning supporting the award to be filed in a so-called court of competent jurisdiction and then to obtain a transfer of the decree is primarily based on the jurisdiction clause found in Section 42, which reads as under:*

***"42. Jurisdiction**. – Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court."*

*The aforesaid provision, however, applies with respect to an application being filed in Court under Part I. The jurisdiction is over the arbitral proceedings. The subsequent application arising from that agreement and the arbitral proceedings are to be made in that court alone.*

*17. However, what has been lost sight of is Section 32 of the said Act, which reads as under:*

***"32. Termination of proceedings**.— (1) The arbitral proceedings shall be terminated by the final arbitral award or by an order of the arbitral tribunal under sub-section (2).*

*(2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings where—*

*(a) the claimant withdraws his claim, unless the respondent objects to the order and the arbitral tribunal recognises a legitimate interest on his part in obtaining a final settlement of the dispute,*

*(b) the parties agree on the termination of the proceedings, or*

*(c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.*

*(3) Subject to section 33 and sub-section (4) of section 34, the mandate of the arbitral tribunal shall terminate with the termination of the arbitral proceedings."*

*The aforesaid provision provides for arbitral proceedings to be terminated by the final arbitral award. Thus, when an award is already made, of which execution is sought, the arbitral proceedings already stand terminated on the making of the final award. Thus, it is not appreciated how Section 42 of the said Act, which deals with the jurisdiction issue in respect of arbitral proceedings, would have any relevance. It does appear that the provisions of the said Code and the said Act have been mixed up.*

*18. It is in the aforesaid context that the view adopted by the Delhi High Court in Daelim Industrial Co. Ltd. v. Numaligarh Refinery Ltd.12 records that Section 42 of the Act would not apply to an execution application, which is not an arbitral proceeding and that Section 38 of the Code would apply to a decree passed by the Court, while in the case of an award no court has passed the decree.*

*19. The Madras High Court in Kotak Mahindra Bank Ltd. v. Sivakama Sundari & Ors.13referred to Section 46 of the said Code, which spoke of precepts but stopped at that. In the context of the Code, thus, the view adopted is that the decree of a civil court is liable to be executed primarily by the Court, which passes the decree where an execution application has to be filed at the first instance. An award under Section 36 of the said Act, is equated to a decree of the Court for the purposes of execution and only for that purpose. Thus, it was rightly observed that while an award passed by the arbitral tribunal is deemed to be a decree under Section 36 of the said Act, there was no deeming fiction anywhere to hold that the Court within whose jurisdiction the arbitral award was passed should be taken to be the Court, which passed the decree. The said Act actually transcends all territorial barriers.*

***Conclusion***

*20. We are, thus, unhesitatingly of the view that the enforcement of an award through its execution can be filed anywhere in the country where such decree can be executed and there is no requirement for obtaining a transfer of the decree from the Court, which would have jurisdiction over the arbitral proceedings.*

11. While deciding the issue, the Court has also considered the scope of Section 36 of the Act, 1996 upon which, learned counsel for the petitioners has placed reliance. The Court has taken a specific view that while award passed by arbitral tribunal is deemed to be a decree under Section 36 of the Act, 1996 and there was no deeming fiction anywhere to hold that the court within whose jurisdiction the arbitral award was passed, should be taken to be the court which passed the decree. In fact the Act transcends all territorial barriers and lastly the Court has held that execution may be filed anywhere in the country, where the decree may be executed and there is no requirement for obtaining transfer of decree from the Court.

12. This issue again came up before Full Bench of Apex Court for consideration in the matter of ***Cheran Properties Limited(Supra)*** and the Apex Court has affirmed the view taken in the matter of ***Sundaram Finance Limited(Supra).*** Relevant paragraphs of the said judgment are bing quoted hereinbelow:

*"39. The reliance which has been sought to be placed on the provisions of Section 42 of the 1996 Act is inapposite. Dr Singhvi relied on the decision in State of West Bengal v Associated Contractors20. The principle which was enunciated in the judgment of this Court was as follows:*

*"24. If an application were to be preferred to a court which is not a Principal Civil Court of original jurisdiction in a district or a High Court exercising original jurisdiction to decide questions forming the subject matter of an arbitration if the same had been the subject matter of a suit, then obviously such application would be outside the four corners of Section 42. If, for example, an application were to be filed in a court inferior to a Principal Civil Court, or to a High Court which has no original jurisdiction, or if an application were to be made to a court which has no subject-matter jurisdiction, such application would be outside Section 42 and would not debar subsequent applications from being filed in a court other than such court.""*

*The conclusion of the Court is in the following terms:*

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

*(b) The expression "with respect to an arbitration agreement" makes it clear that Section 42 will apply to all applications made whether before or during arbitral proceedings or after an award is pronounced under Part I of the 1996 Act.*

*(c) However, Section 42 only applies to applications made under Part I if they are made to a court as defined. Since applications made under Section 8 are made to judicial authorities and since applications under Section 11 are made to the Chief Justice or his designate, the judicial authority and the Chief Justice or his designate not being court as defined, such applications would be outside Section 42.*

*(d) Section 9 applications being applications made to a court and Section 34 applications to set aside arbitral awards are applications which are within Section 42.*

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

*(f) Section 42 will apply to applications made after the arbitral proceedings have come to an end provided they are made under Part I.*

*(g) If a first application is made to a court which is neither a Principal Court of Original Jurisdiction in a district or a High Court exercising original jurisdiction in a State, such application not being to a court as defined would be outside Section 42. Also, an application made to a court without subject-matter jurisdiction would be outside Section 42.*

*40. More recently in Sundaram Finance Limited v Abdul Samad21, this Court considered the divergence of legal opinion in the High Courts on the question as to whether an award under the 1996 Act is required to be first filed in the Court having jurisdiction over the arbitral proceedings for execution, to be followed by a transfer of the decree or whether the award could be filed and executed straight-away in the Court where the assets are located. Dealing with the provisions of Section 36, Justice Sanjay Kishan Kaul observed thus:"*

*"14. The aforesaid provision would show that an award is to be enforced in accordance with the provisions of the said code in the same manner as if it were a decree. It is, thus, the enforcement mechanism, which is akin to the enforcement of a decree but the award itself is not a decree of the civil court as no decree whatsoever is passed by the civil court. It is the arbitral tribunal, which renders an award and the tribunal does not have the power of execution of a decree. For the purposes of execution of a decree the award is to be enforced in the same manner as if it was a decree under the said Code."*

*"16. The aforesaid provision, however, applies with respect to an application being filed in Court under Part I. The jurisdiction is over the arbitral proceedings. The subsequent application arising from that agreement and the arbitral proceedings are to be made in that court alone.*

*17. However, what has been lost sight of is Section 32 of the said Act, which reads as under:*

***"32. Termination of proceedings**.— (1) The arbitral proceedings shall be terminated by the final arbitral award or by an order of the arbitral tribunal under sub-section (2).*

*(2) The arbitral tribunal shall issue an order for the termination of CIVIL APPEAL No.1650 of 2018 Page 17 of 21 the arbitral proceedings where—*

*(a) the claimant withdraws his claim, unless the respondent objects to the order and the arbitral tribunal recognises a legitimate interest on his part in obtaining a final settlement of the dispute,*

*(b) the parties agree on the termination of the proceedings, or (c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.*

*(3) Subject to section 33 and sub-section (4) of section 34, the mandate of the arbitral tribunal shall terminate with the termination of the arbitral proceedings."*

*The aforesaid provision provides for arbitral proceedings to be terminated by the final arbitral award. Thus, when an award is already made, of which execution is sought, the arbitral proceedings already stand terminated on the making of the final award. Thus, it is not appreciated how Section 42 of the said Act, which deals with the jurisdiction issue in respect of arbitral proceedings, would have any relevance.."*

*Consequently, in the view of the Court, the enforcement of an award through its execution can be initiated anywhere in the country where the decree can be executed and there is no requirement of obtaining a transfer of the decree from the Court which would have jurisdiction over the arbitral proceedings.*

13. Following the judgments of Hon'ble Apex Court, similar view has also been taken by the Allahabad High Court in the matter of ***Madhyanchal Vidyut Vitran Nigam Ltd.(Supra).*** Relevant paragraph of the said judgment is being quoted hereinbelow:

*"12. From the judgments delivered by the Counsel for the parties and referred above, the Executing Court having jurisdiction to execute the award can be any court anywhere in the Country, where the decree can be executed and thus in view of the law expounded in the case of Cheran Properties Limited (Supra), I have no hesitation in holding that the objection of the petitioner that the Court at Lucknow had no jurisdiction loses its relevance and is worthy of rejection. Thus, on the ground*

*of jurisdiction, the argument of the Counsel for the petitioner cannot be sustained as there is no error or infirmity in the order impugned dated 10.03.2023 passed by the Commercial Court, Lucknow and the same is upheld."*

14. In the matter of ***Bharat Petroleum Corporation Ltd.(Supra)*** Allahabad High Court has taken the very same view.

15. Now coming to the present case. It is undisputed that the dispute is arising out of acquirement of land of petitioners at District Etawah, meaning thereby, property and assets of the petitioners is situated at there, therefore, even if the office of petitioners is at Kanpur or arbitration award was pronounced at Kanpur, that would make no difference in filing of execution proceeding at Etawah in light of interpretation made by the Hon'ble Apex Court and the provision of CPC as well as Act, 1996 occupying the field. Therefore, this Court is of the firm view that impugned order is very well in conformity of the law laid down by the Hon'ble Apex Court.

16. Now coming to the another argument of the learned counsel for the petitioners about the acquiescing the right to raise objection about the jurisdiction. Undisputedly against an award given at Kanpur, petitioners themselves have preferred appeal under Section 34 of the of the Act, 1996 before District Judge, Etawah, therefore, petitioners acquiesce their right and their objection is certainly barred by Section 4 of the Act, 1996. He cannot raise these objections at this stage.

17. Therefore, on both counts, I found no illegality or infirmity in the impugned order dated dated 05.08.2024.

18. Petition lacks merit and is hereby **dismissed**.

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**(2024) 11 ILRA 140**
**APPELLATE JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 05.11.2024**

**BEFORE**

**THE HON'BLE SIDDHARTHA VARMA, J.**
**THE HON'BLE VINOD DIWAKAR, J.**

Criminal Appeal No. 748 of 1983

**Ram Krishna ...Appellant**
**Versus**
**State of U.P. ...Respondent**

**Counsel for the Appellant:**
N.K. Saxena, Ashok Kumar Dwivedi, Ram Kishore Gupta

**Counsel for the Respondent:**
K.P. Shukla, A.G.A.

**(A) Criminal Law - Criminal Procedure Code, 1973 - Sections-161, 207 & 313 - Indian Penal Code,1860 - Section 302 - Arms Act,1959 - Sections – 25, 25(1)(a) & 25(1)(b)** - Appeal – against conviction & sentence – offence of murder – FIR – allegation that, when the accused called the deceased son of informant from his house and when he reached at door he shot at and died on spot - investigation – trial by session judge – conviction & sentence – benefit of doubt - Evaluation of evidence - court finds that, in the light of finding of trial court its becomes imperative to examine the witness on two aspects – firstly motive & secondly the act performed by the accused in commission of crime - the motive behind the commission of murder according to PW-1 (informant, father of deceased) that despite reprimand the deceased kept working with Bhagwan Singh with whom he had animosity – convention is based solely on the testimony of PW-1 and PW-3 – PW -1 in stated that the incident was witnessed/seen by Murlidhar, Ram Ratan, Ram Asrey, Chaman, Rafiq, but filed to justify except Ram Asrey (PW-

2) as to why the police are not produced the other witnesses – and police witness Bhagwan Singh whose name is also figured in FIR and whom had animosity with accused has also not produced which caste serious doubt on the prosecution story – Moreso when suggestion was given to the PW-1 that his son's name was arrayed as an accused in the murder of Bhagwan Singh's father, showed ignorance which also cast doubt on the truthfulness of the witness deposited – held, conviction, based on a testimony which is neither wholly reliable nor wholly unreliable, would be unsafe – accordingly, appellant is entitled for the benefit of doubt as suspicion so raised cannot take the place of evidence – Appeal allowed – impugned conviction and sentence is hereby set-aside. (Para - 18, 24, 25, 26, 27)

**Appeal Allowed.** (E-11)

**List of Cases cited:**

1. Harchand Singh & anr. Vs St. of Har. (1974 vol. 3 SCC 397),

2. Vadivelu Thevar Vs St. of Madras (AIR 1957 SC 614),

(Delivered by Hon'ble Vinod Diwakar, J.)

1. Heard Shri Ram Kishor Gupta, learned counsel for the appellant, Shri Amit Sinha, learned A.G.A. assisted by Ms. Mayuri Mehrotra, learned brief holder for the State-respondent, and perused the record.

2. Upon completing the investigation in Case Crime No.49 of 1981, u/s 302 IPC and in Case Crime No.51 of 1981, u/s 25 of Arms Act, both registered at P.S. Kharela, District Hamirpur, the police filed the charge-sheet against the accused-appellant Ram Krishna and he was charged u/s 302 IPC and section 25 of Arms Act respectively, wherein, he denied the prosecution case and claimed trial.

3. The learned trial court vide impugned judgment and order dated 8.3.1983 convicted the accused-appellant Ram Krishna, and sentenced him to undergo life imprisonment for the offenses under Sections 302 IPC and section 25 of the Arms Act. Aggrieved by the impugned judgment of conviction and order of sentence, the accused-appellant preferred the instant appeal before this Court.

4. The prosecution case, in brief, is that a written complaint was lodged at Police Station Kharela, District Hamirpur, on 11.8.1981 at 17:30 p.m. regarding an incident took place in broad day light in Mohalla Manik Kasba Kharela, by one Siddha- father of the deceased- Bahadur with the allegation that the accused Ram Krishun Singh called his son Bahadur at gate and when his son reached at the gate of his house, he shot dead his son with a double barrel gun. On hearing the rescue cry by the complainant, Murli s/o Bhannu Teli, Ram Asrey s/o Daya Ram Teli, Ram Ratan s/o Buddh Kori also reached at the place of incident. The deceased died on spot. For clarity the contents of tehrir are reproduced herein below:

*"श्रीमान थानेदार साहब थाना खरेला जिला हमीरपुर सेवा में निवेदन है मै और मेरा लड़का बहादुर अपने घर के आंगन में बैठकर गेहूँ बीन रहे थे कि दिन लटकत की वेरा राम किशुन सिंह वल्द राम सहाय सिंह साकिन मुहल्ला मानिक कस्बा खरेला जो अपने हाथ में दुनाली बन्दूक लिये था मेरे दरवाजे पर आया और मेरे लड़के बहादुर को दरवाजे से बुलाया जैसे ही मेरा लड़का दरवाजे पर गया कि राम किशुन ने मेरे लड़के पर बन्दूक से फायर कर दिया फायर की आवाज सुनकर मे दरवाजे पर*

*गया और चिल्लाया कि मुरली पुत्र भन्नू तेली साकिन मुहल्ला मानिक राम आसरे पुत्र दयाराम तेली मुहल्ला सादराम व राम रतन पुत्र बुद्ध कोरी मुहल्ला बरूआ कस्बा खरेला मौके पर आ गये कि राम किशुन ने दुबारा मेरे लड़के पर फायर करके भाग गया मेरा लड़का तड़प तड़प कर दरवाजे पर गिर कर मर गया। राम किशुन सिंह ने मेरे लड़के को कई बार मना किया कि तुम भगवान सिंह के यहाँ जिन से मेरा जमीन के सम्बन्ध में झगड़ा चला आ रहा है। नौकरी मत करो मेरा लड़का नहीं माना इसी वजय पर राम किशुन सिंह ने मेरे लड़के को जान से मार दिया रिपोर्ट लिखकर उचित कार्यवाही की जावे। प्रार्थी सिद्धा पुत्र हल्कू बेहना साकिन मुहल्ला सादराय कस्बा खरेला थाना खरेला ता० 11.8.81 नि०अं० सिद्धा लेखक बाबू खाँ पुत्र नवी बक्स मुहाल सादराय कस्बा व थाना खरेला जिला हमीरपुर ता० 11.8.81"*

5. The motive assigned in the tehrir is that the deceased- son of the complainant was working with one Bhagwan Singh, who had a land dispute with the accused and the accused has reprimanded the complainant's son not to work with one Bhagwan Singh or else he would be killed.

6. On receipt of the information, after registration of the FIR, the police conducted the investigation and recorded the statement of the witnesses under section 161 Cr.P.C. and filed the charge-sheet against the accused-appellant.

7. The Chief Judicial Magistrate took the cognizance and after complying with the provisions of section 207 Cr.P.C. committed the case to the court of sessions for its trial. The trial court framed the charge under section 302 IPC against the accused-appellant and a separate charge was framed under section 25(1)(a) and 25(1)(b) of the Arms Act and the same was read over and explained to the accused, who pleaded not guilty and claimed trial.

8. The prosecution has produced the following documentary evidence to prove its case:

*"(i) Written Report dated 11.8.1981 marked as exhibited as Ex.Ka-1*

*(ii) First Information Report dated 11.8.1981, marked and exhibited as Ex.Ka-2*

*(iii) First Information Report dated 25.8.1981, marked and exhibited as Ex.Ka-18*

*(iv) Recovery memo of 12 bore pistol dated 25.8.1981, marked as exhibited at Ex.Ka-18*

*(v) Recovery memo of blood stained vest & 'Gamchha' dated 11.8.1981 marked and exhibited as Ex.Ka-10*

*(vi) Recovery memo of one pellet dated 11.8.1981 marked and exhibited as Ex.Ka-11*

*(vii) Recovery memo of plain and blood stained soil dated 11.8.1981 marked and exhibited as Ex.Ka-14*

*(viii) Recovery memo of 12 bore pistol dated 25.8.1981, marked as exhibited at Ex.Ka-4*

*(ix) Post-mortem report dated 12.8.1981 marked and exhibited as Ex.Ka-6*

*(x) Report of Vidhi Vigyan Prayogshala marked and exhibited as Ex.Ka-24*

*(xi) Letter to chemical examiner dated 12.8.1981*

*(xii)Report of Chemical examiner marked and exhibited as Ex.Ka-26*

*(xiii) Panchayatnama dated 11.8.1981 marked and exhibited as Ex.Ka-7*

*(xiv) Charge-sheet 'mool' dated 11.10.1981 marked and exhibited as Ex.Ka-17*

*(xv) Charge-sheet 'mool' dated 23.9.1981 marked and exhibited as Ex.Ka-20"*

9. Besides the above documentary evidence, the prosecution has examined the complainant- Siddha as PW-1; Ram Asrey who had reached the place of incident after hearing the rescue call as PW-2; Kumari Chaman, an eye-witness as PW-3; Ct. Moharrir Mohan Swaroop Pachauriya as PW-4; Kamta Prasad, witness to the recovery of gun as PW-5; Dr. Ghanshyam Pandey, who conducted the post-mortem of the deceased as PW-6; Inspector Satya Narayan, the 1st I.O. as PW-7; H/Ct. Ram Vilas Chaturvedi as PW-8; Kewal Singh, the 2nd I.O. as PW-9.

10. Complainant Siddha - the deceased's father- was examined as PW-1. In his examination-in-chief, he reiterated the facts mentioned in the impugned FIR and stated that accused Ram Kishun present in the court had committed his son's murder, who was working with one Bhagwan Singh. Accused Ram Kishun had enmity with Bhagwan Singh. The witness states that he and complainant's son was at home when the accused Ram Kishun reached at his door and called the deceased Bahadur and as the complainant's son reached at the Dehri (door step) of his house, accused – appellant - Ram Kishun fired at him and because of gun shot injury his son died on spot. The accused-appellant threatened the witness to leave the place failing which he would shot the complainant as well. The said incident was also seen by Babu Khan, Ram Asrey, Murlidhar and Ram Ratan and witness Babu Khan scribed the tehrir at his instance, the witness also identified the gun by whom his son was killed.

11. As per the impugned judgment, the complainant supported the prosecution case. PW-2 & PW-3, the eye witness had also seen the incident, they have supported the prosecution case. The rest of the witnesses are police witnesses and their testimony shall be examined in the subsequent paragraphs. PW-6 Ghanshyam Pandey conducted the post-mortem and opined that death was caused due to shock and haemorrhage as a result of ante-mortem injuries.

12. The incriminating material produced by the prosecution during the trial was then confronted by the accused persons, who recording his statement u/s 313 Cr.P.C. He said that he has been falsely implicated by one Bhagwan Singh as he is a witness in the case of murder committed by said Bhagwan Singh and he wanted to save real culprits. The trial court discussed the evidence adduced by the prosecution and relied upon the testimony of PW-1, PW-2 & PW-3 and convicted accused-appellant Ram Kishun.

13. *Per contra*, learned A.G.A. for the State vehemently espoused the case of complainant and argued that the order passed by the trial court is just and reasonable and sustainable in the eyes of law. The testimony of eye witness PW-1 & PW-3 cannot be brushed aside. The statement of eye witness are coherent, consistent and cogent and fully corroborates by the medical evidence; thus, prosecution has proved the charges beyond reasonable doubt. The conviction and

sentence of the accused-appellant do not impart interference. The court below was justified in relying the testimony of PW-1, which is wholly proved and corroborated by the testimony of PW-3 and PW-6 Dr. Ghanshyam Pandey, who conducted the post-mortem of the deceased. There are no material contradictions in the evidence adduced on behalf of the prosecution. PW-1 Siddha being the father of the deceased, would be the most reluctant to spare the actual assailants and falsely mentioned the name of other person, who is not responsible for the death of his son.

14. Learned A.G.A. further contends that merely because of minor contradiction and inconsistent brought by the witness cannot be a ground to discard of the testimony of PW-1. He further submits that there is no reason to disbelieve the testimony of PW-1 & PW-3, who are co-villagers and had reached the place of incident soon after hearing the rescue call.

15. Learned counsel for the appellant primarily assailed the impugned order on the ground that ocular testimony does not corroborate with the medical and scientific evidence, therefore, the testimony of PW-1 needs appreciation with great caution. The testimony of eye witness PW-1 & PW-3 cannot be relied upon because it contains material contradictions and improvements. PW-1's statement was contrary to the statement recorded by police u/s 161 Cr.P.C. and no explanation was given as to why the Investigating Officer did not record certain material facts which were necessary to establish the prosecution case beyond reasonable doubt and he also resiled from the prosecution's case. The motive of offence is absurd and prosecution has failed to prove the motive beyond reasonable doubt. Prosecution has not produced witness Murlidhar and Ram Ratan whose names are figured in the FIR for reasons best known to the prosecution. The person with whom the accused had enmity i.e. Bhagwan Singh has not been produced by the prosecution as prosecution's witness for the reasons best known to them. The prosecution has miserably failed to connect the accused with the commission of offence. The testimony of PW-1 and PW-3 is full of contradictions and embellishment and cannot be relied upon. Further the prosecution has failed to prove the corroboration. The deposition of PW-1 & PW-3 should be disbelieved as it ought to be in view of the evidence surfaced during the trial. Other material on record, do not show the accused's complicity in the offence; thus, the appellant is liable to be acquitted of the charges. The prosecution could not establish any link between the accused and one Bhagwan Singh. The sole motive for the commission of offence is absurd and non-conclusive. It is not safe to rely upon the testimony of the interested witness, which are full of contradictions and embellishment without corroboration.

16. The scientific evidence do not corroborate with the medical evidence. The ballistic report does not support the commission of offence in the way as it has been presented by the prosecution. The witness to the inquest report are not produced before the trial court to the reason best known to the prosecution, in fact name of one Bhagwan Singh is shown in the inquest report as witness no.3, but he was not produced as witness. Ram Swaroop, Murlidhar, Chaman Lal, Ram Ratan, Mohan Lal, Rameshwar, Rafiq Ahmad are all police witnesses, but none of them has been brought to the witness box. Kamta Prasad and Bhagwan Singh were also seen

their names as witness nos.12 & 13 of the charge-sheet, but the prosecution could not produce them.

17. A perusal of the trial court judgment would reveal the conviction is based on the testimony of PW-1 & PW-3 while recording the finding of conviction against accused-appellant, the trial court believed that there was no question to disbelieve the testimony of PW-1 Siddha, who is father of the deceased and was present at the time of incident. The learned trial court found the statement of Kumari Chaman (PW-3), wholly reliable but not marred in material discrepancy or contradiction even though she was subjected to a nagging cross examination at the hands of experienced lawyers. Kumari Chaman is innocent child and having no seeds of animosity in her heart.

18. In the light of the finding of trial court its becomes imperative to examine the witness on two aspects; firstly, the motive and secondly, the act performed by the accused in the commission of the crime. It is an admitted case of the prosecution that the accused called the deceased from his house and when he reached at this door step he was shot at and died on spot. The sole motive behind the commission of murder was that despite reprimand the deceased kept working with Bhagwan Singh with whom he had animosity.

19. The cumulative effect of both oral testimony and documentary evidence is paramount, to assess the sterling quality and admissibility of the evidence presented during the trial. The court must weigh the credibility and reliability of both oral and documentary evidence to determine their overall probative value. To assess evidence as of sterling quality, the court should consider various factors, including consistency, corroboration, relevancy, and authenticity. Additionally, the court should evaluate the demeanor of the witnesses, the clarity and coherence of the testimony, and veracity of the documentary evidence.

20. Certainly the prosecution case would have been at a better footing if the Investigating Officer (PW-5) had sent the pellets recovered from the deceased and blood-soaked soil to the Forensic Science Laboratory and had made efforts to recover the weapon of offence, i.e. gun for comparison. However, the report of the ballistic expert and F.S.L. report would have, in any case, been of the nature of an expert opinion, and the same is not conclusive evidence, but the failure of the Investigating Officer in sending the blood-soaked soil and pellets recovered from the deceased cannot be said to fatal for prosecution, if the same is fully established from the testimony of the sole eyewitness (PW-1), in whose presence the fire was shot at on the deceased, and because of the firearm injury, the deceased died.

21. It is the responsibility not only of the investigating agency but also of the courts to ensure that the investigation is conducted fairly and does not infringe upon an individual's freedom except as prescribed by the law. Equally integral to criminal law is the principle that the investigating agency bears a significant responsibility to conduct an investigation without bias and/or fairness. The investigation should not, at first glance, suggest a prejudiced mindset, and every endeavor should be made to hold the guilty accountable under the law, as no one is above it, irrespective of their societal status or influence.

22. The Supreme Court in **Vadivelu Thevar v. State of Madras** has carved out

three categories of witnesses; (i) wholly reliable, (ii) wholly unreliable, and (iii) neither wholly reliable nor wholly unreliable, and thus held:

*"In view of these considerations, we have no hesitation in holding that the contention that in a murder case, the court should insist upon plurality of witnesses, is much too broadly stated. Section 134 of the Indian Evidence Act has categorically laid it down that "no particular number of witnesses shall in any case be required for the proof of any fact." The legislature determined, as long ago as 1872, presumably after due consideration of the pros and cons, that it shall not be necessary for proof or disproof of a fact, to call any particular number of witnesses. In England, both before and after the passing of the Indian Evidence Act, 1872, there have been a number of statutes as set out in Sarkar's I Law of Evidence -9th Edition, at pp. 1 100 and 1 101, forbidding convictions on the testimony of a single witness. The Indian Legislature has not insisted on laying down any such exceptions to the general rule recognized in s. 134 quoted above. The section enshrines the well-recognized maxim that "Evidence has to be weighed and not counted". Our Legislature has given statutory recognition to the fact that administration of justice may be hampered if a particular number of witnesses were to be insisted upon. It is not seldom that a crime has been committed in the presence of only one witness, leaving aside those cases which are not of uncommon occurrence, where determination of guilt depends entirely on circumstantial evidence. If the Legislature were to insist upon plurality of witnesses, cases where the testimony of a single witness only could be available in proof of the crime, would go unpunished. It is here that the discretion of the presiding judge comes into play. The matter thus must depend upon the circumstances of each case and the quality of the evidence of the single witness whose testimony has to be either accepted or rejected. If such a testimony is found by the court to be entirely reliable, there is no legal impediment to the conviction of the accused person on such proof. Even as the guilt of an accused person may be proved by the testimony of a single witness, the innocence of an accused person may be established on the testimony of a single witness, even though a considerable number of witnesses may be forthcoming to testify to the truth of the case for the prosecution. Hence, in our opinion, it is a sound and well- established rule of law that the court is concerned with the quality and not with the quantity of the evidence necessary for, proving or disproving a fact. Generally speaking, oral testimony in this context may be classified into three categories, namely:*

*(1) Wholly reliable.*

*(2) Wholly unreliable.*

*(3) Neither wholly reliable nor wholly unreliable."*

23. The Supreme Court in **Harchand Singh & Anr. v. State of Haryana**, held that (i) the function of the court in a criminal trial is to find whether the person arrayed before it as the accused is guilty of the offense with which he is charged. For this purpose, the court scans the material on record to find whether there is any reliable and trustworthy evidence upon the basis of which it is possible to found the conviction of the accused and to hold that he is guilty of the offense with which he is charged; (ii) the court can base the conviction of the accused on a charge of murder upon the testimony of a single witness if the same was found to be convincing and reliable. If

in a case the prosecution leads two acts of evidence, each one of which contradictions and strikes at the other and shows it to be unreliable, the result would necessarily be that the court would be left with no reliable and trustworthy evidence upon which the conviction of the accused might be based. Inevitably, the accused would have the benefit of such a situation.

24. Based on the foregoing discussions, we conclude that PW-1 Siddha stated in his statement that the incident was witnessed/seen by Murlidhar, Ram Ratan, Ram Asrey, Chaman, Rafiq, but failed to justify except Ram Asrey (PW-2) as to why the police witness Rafiq Ahmad, Rameshwar, Mohan, Babu Khan, Chaman Lal, Murlidhar, Ram Ratan, Ram Swaroop, Kamta Prasad and Bhagwan Singh are not produced by the prosecution. This fact assumes significance that witness Bhagwan Singh police witness has been figured in the FIR, had animosity with accused, therefore, non production of witness Bhagwan Singh casts serious doubt on the prosecution story, moreso when suggestion was given to the PW-1 that his son's name was arrayed as an accused in the murder of Phool Singh and Sheo Nath Singh, he showed ignorance which also cast doubt on the truthfulness of the witness deposition. Witness PW-2 has denied his knowledge about the murder of Bhagwan Singh's father in which Siddha (PW-1), Babu Singh, Prithvi Singh were arrayed as accused.

25. Therefore, applying the law held in **Vadivelu Thevar (supra)** and **Harchand Singh (supra),** we conclude that the PW-1's testimony is neither wholly reliable nor wholly unreliable and conviction based on testimony of PW-1 would be unsafe.

26. In the given facts-circumstances, the appellant is entitled for the benefit of doubt as suspicion so raised can not take the place of evidence.

27. As a result, the conviction and sentence passed against the appellant vide impugned judgment of conviction and order of sentence dated 8.3.1983, passed by 3rd Additional Sessions Judge, Hamirpur in Sessions Trial No.51 of 1982 titled State v. Ram Krishna, u/s 302 IPC and Sessions Trial No.16 of 1983 titled State v. Ram Krishna, u/s 25 of Arms Act, registered at Police Station Kharela, District Hamirpur, is hereby set aside and the appellant is acquitted of all the charges. Thus, the appeal is **allowed**.

28. Office is directed to send back the record of this appeal to the trail court concerned along with a copy of this order for compliance of section 437-A Cr.P.C.

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**(2024) 11 ILRA 147**
**APPELLATE JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 13.11.2024**

**BEFORE**

**THE HON'BLE RAJNISH KUMAR, J.**

Second Appeal Defective No. 94 of 2024

**Vidhan Chandra Pandey & Anr.**
**...Appellants**
**Versus**
**State of U.P. & Anr. ...Respondents**

**Counsel for the Appellants:**
Ravi Prakash Mishra

**Counsel for the Respondents:**

**Civil Law-The Indian Evidence Act,1872-Sections 107 & 108-** Suit for declaration of death---Section 107 provides that when the question is whether a man is alive or dead, and it is shown that he was alive within thirty years,

the burden of proving that he is dead is on the person who affirms it and Section 108 provides that when the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it. Thus, when a question will arise as to whether a man is alive or dead, only then the presumption can be drawn by the court on the cogent evidence adduced by the person, who affirms it. This question may arise, if a person claims or he is denied any right or benefit or for any other cause, which may be dependent on the death of the person, who has not been heard of for seven years by those who would have naturally have heard of him.

**Appeal Dismissed**. (E-15)

**List of Cases cited:**

LIC of India Vs Anuradha, (2004) 10 SCC 131

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

***(C.M. Application No.1 of 2024)***

1. Heard Shri Ravi Shankar Mishra, learned counsel for the appellant.

2. The office has reported a delay of 22 days in filing the appeal.

3. The ground shown in the affidavit filed in support of the application is sufficient to condone the delay.

4. The application is allowed and the delay in filing the appeal is condoned.

**In re: Appeal**

1. Heard learned counsel for the appellant.

2. The appeal has been filed assailing the judgment and decree dated 30.05.2024 passed in Civil Appeal No.63 of 2023 (Vidhan Chandra Pandey & Others Vs. Common Man & Another) by Additional District & Sessions Judge/ F.T.C.-1, Pratapgarh and the judgment and decree dated 01.04.2023 passed in Original Suit No.154 of 2021 (Vidhan Chandra Pandey & Others Vs. Common Man & Another) by Civil Judge (Senior Division), Pratapgarh, by means of which the suit for declaration of death of brother of the appellant no.1 and the son of the appellant no.2 has been dismissed and the appeal filed by the appellant has also been dismissed.

3. Learned counsel for the appellants submits that the brother of the appellant no.1 was missing for the last more than seven years, therefore, he had filed the suit for declaration of his death but without considering it, the suit has wrongly and illegally been dismissed.

4. Having considered the submissions of learned counsel for the appellants, I have perused the material placed on records of this appeal.

5. The suit filed by the appellants for declaration of death of Akhilesh Chandra has been dismissed on the ground that the appellants have failed to adduce any evidence of death of brother of the appellant no.1 and son of appellant no.2 for making presumption under Section 108 of Indian Evidence Act as any property or legal right of the appellants have not been denied by any department or authority.

6. Sections 107 and 108 of Indian Evidence Act, relevant for this case, are extracted here-in-below:-

***"107. Burden of proving death of person known to have been alive within thirty years. -*** *When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it.*

***108. Burden of proving that person is alive who has not been heard of for seven years. -*** *1 [Provided that when] the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is 2 [shifted to] the person who affirms it."*

7. The aforesaid Section 107 provides that when the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it and Section 108 provides that when the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it. Thus, when a question will arise as to whether a man is alive or dead, only then the presumption can be drawn by the court on the cogent evidence adduced by the person, who affirms it. This question may arise, if a person claims or he is denied any right or benefit or for any other cause, which may be dependent on the death of the person, who has not been heard of for seven years by those who would have naturally have heard of him.

8. In the present case no such occasion has arisen and the suit for declaration of civil death only was filed, therefore, this Court is of the view that learned trial court has rightly and in accordance with law dismissed the suit. Accordingly, the appeal filed by the appellant has also been dismissed. Even otherwise no declaration of civil death can be made. Only a presumption of civil death can be made, if the aforesaid conditions are fulfilled, if the question arises.

9. The Hon'ble Supreme Court, in the case of **LIC of India Vs. Anuradha, (2004) 10 SCC 131,** has held that an occasion for raising the presumption would arise only when the question is raised in a Court, Tribunal or before an authority who is called upon to decide as to whether a person is alive or dead. So long as the dispute is not raised before any forum and in any legal proceedings the occasion for raising the presumption does not arise. The relevant paragraphs 12, 13 & 14 are reproduced here-in-below:-

*"12. Neither Section 108 of the Evidence Act nor logic, reason or sense permit a presumption or assumption being drawn or made that the person not heard of for seven years was dead on the date of his disappearance or soon after the date and time on which he was last seen. The only inference permissible to be drawn and based on the presumption is that the man was dead at the time when the question arose subject to a period of seven years' absence and being unheard of having elapsed before that time. The presumption stands unrebutted for failure of the contesting party to prove that such man was alive either on the date on which the dispute arose or at any time before that so as to break the period of seven years counted backwards from the date on which the question arose for determination. At what point of time the person was dead is*

*not a matter of presumption but of evidence, factual or circumstantial, and the onus of proving that the death had taken place at any given point of time or date since the disappearance or within the period of seven years lies on the person who stakes the claim, the establishment of which will depend on proof of the date or time of death.*

*13. A presumption assists a party in discharging the burden of proof by taking advantage of presumption arising in his favour dispensing with the need of adducing evidence which may or may not be available. Phipson and Elliott have observed in Manual of the Law of Evidence (11th Edn., at p. 77) that although there is almost invariably a logical connection between basic fact and presumed fact, in the case of most presumptions it is by no means intellectually compelling. In our opinion, a presumption of fact or law, which has gained recognition in statute or by successive judicial pronouncements spread over the years, cannot be stretched beyond the limits permitted by the statute or beyond the contemplation spelled out from the logic, reason and sense prevailing with the judges, having written opinions valued as precedents, so as to draw such other inferences as are not contemplated.*

*14. On the basis of the abovesaid authorities, we unhesitatingly arrive at a conclusion which we sum up in the following words: the law as to presumption of death remains the same whether in the common law of England or in the statutory provisions contained in Sections 107 and 108 of the Indian Evidence Act, 1872. In the scheme of the Evidence Act, though Sections 107 and 108 are drafted as two sections, in effect, Section 108 is an exception to the rule enacted in Section 107. The human life shown to be in existence, at a given point of time which according to Section 107 ought to be a point within 30 years calculated backwards from the date when the question arises, is presumed to continue to be living. The rule is subject to a proviso or exception as contained in Section 108. If the persons, who would have naturally and in the ordinary course of human affairs heard of the person in question, have not so heard of him for seven years, the presumption raised under Section 107 ceases to operate. Section 107 has the effect of shifting the burden of proving that the person is dead on him who affirms the fact. Section 108, subject to its applicability being attracted, has the effect of shifting the burden of proof back on the one who asserts the fact of that person being alive. The presumption raised under Section 108 is a limited presumption confined only to presuming the factum of death of the person whose life or death is in issue. Though it will be presumed that the person is dead but there is no presumption as to the date or time of death. There is no presumption as to the facts and circumstances under which the person may have died. The presumption as to death by reference to Section 108 would arise only on lapse of seven years and would not by applying any logic or reasoning be permitted to be raised on expiry of 6 years and 364 days or at any time short of it. An occasion for raising the presumption would arise only when the question is raised in a court, tribunal or before an authority who is called upon to decide as to whether a person is alive or dead. So long as the dispute is not raised before any forum and in any legal proceedings, the occasion for raising the presumption does not arise."*

10. In view of above, this Court does not find any illegality or error in the impugned judgment and decrees. No substantial question of law arises in this

second appeal. The appeal has been filed on misconceived and baseless grounds.

11. The second appeal is, accordingly, **dismissed**.

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**(2024) 11 ILRA 151**
**APPELLATE JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 18.11.2024**

**BEFORE**

**THE HON'BLE KSHITIJ SHAILENDRA, J.**

First Appeal From Order No. 62 of 2024

**Srivatsa Goswami ...Appellant**
**Versus**
**Anant Prasad Singh & Anr. ...Respondents**

**Counsel for the Appellant:**
Tarun Agrawal

**Counsel for the Respondents:**
Anita Singh, Dinesh Kumar Misra, Ishir Sripat

**(A) Civil Law - Rejection of Plaint on Grounds of Limitation - Code of Civil Procedure, 1908 - Order VI Rule 4 - Particulars to be given where necessary, Order VII Rule 11 - Rejection of Plaint, Limitation Act, 1963 - Article 58 - limitation to institute a suit, Section 17 - Effect of fraud or mistake - Requirement for disclosure of dates in pleadings involving fraud or concealment - Limitation as a mixed question of fact and law - when the evidence is yet to be led on all the disputed questions of fact and law, question of limitation cannot be said to be a pure question of law so as to justify rejection of plaint at its threshold. (Para - 5,6,8,12,13)**

Plaintiff sought to declare registered gift deeds executed in 1968 and 1987 – null, void ab initio, irrelevant and ineffective - citing fraud and concealment - Trial court rejected plaint as time-barred under Order VII Rule 11 CPC - appellate court treated limitation issue as a "mixed question of fact and law" - remanded the matter for trial. (Para - 3,4)

**HELD: -** Appellate court was justified in leaving the question of limitation to be decided as a mixed question of fact and law after leading the evidence. (Para -13)

**Appeal dismissed.** (E-7)

**List of Cases cited:**

1. Saranpal Kaur Anand Vs Praduman Singh Chandhok, (2022) 8 S.C.C. 401

2. Smt. Razia Begum Vs D.D.A. & ors., 2014 SCC OnLine Del 4628

3. Dr. Chandra Mohan Singhal & ors. Vs St. of U.P., 2002 (4) AWC 2686

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

1. Heard Shri Tarun Agrawal, learned counsel for the defendant-appellant and Shri Rahul Sripat, learned Senior Counsel assisted by Shri Ishir Sripat, learned counsel for the plaintiff-respondents.

2. The instant appeal has been converted from "Second Appeal" to "First Appeal From Order" under the previous orders of this Court, inasmuch as, the order impugned is an order of remand passed in civil appeal.

3. The appellant is defendant in Original Suit No.83 of 2022 (Anant Prasad Singh v. Shrivatsa Goswami and others). The suit was filed claiming a decree for declaring a registered gift deed dated 25.05.1968 and another gift deed dated 17.10.1987, registered on 15.01.1988 as null, void ab initio, irrelevant and ineffective, insofar as the plaintiff's rights

are concerned. In the said suit, an application under Order VII Rule 11 C.P.C. was filed by the defendant-appellant which was allowed by the trial court on 22.11.2022. Consequently, the plaint was rejected holding the suit as barred by limitation by invoking Order VII Rule 11(d) CPC. Against the order of trial court, Civil Appeal No.67 of 2022 (Anant Prasad Singh v. Shrivats Goswami and another) was filed by the plaintiff-respondents which has been allowed by the order impugned dated 06.04.2023 and the matter has been remanded to the trial court to re-register the suit, invite written statement and other objections from the defendants on all aspects including limitation, to frame additional issue on limitation and take a decision on all the issues after leading evidence.

4. Assailing the order impugned, Shri Tarun Agrawal, learned counsel for the appellant submits that one Girija Devi executed a gift deed dated 25.05.1968 in favour of Vishnu Priya who, later on, executed another gift deed dated 17.10.1987 registered on 15.01.1988 in favour of Shri Purushottam Lal Goswami, i.e. father of the defendant-appellant. He died on 21.02.2017 and the suit in question was filed on 07.02.2022. Reading out the plaint averments especially those contained in paragraph 21 thereof, it is contended that the plaintiff deliberately concealed the date of knowledge of the registered documents and admitted in the plaint itself that earlier attempt of getting the name of the defendant mutated in the revenue records was made ineffective by the plaintiff. He, therefore, submits that by concealing the date about knowledge of registered instruments in the entire plaint, the plaintiff committed breach of the mandatory provisions of Order VI Rule 4 CPC, inasmuch as, the limitation to institute a suit of this nature would be governed by Article 58 of Part III of the Limitation Act, 1963 (hereinafter referred to as 'the Act of 1963') which prescribes a period of three years of limitation from the date when the right to sue first accrues. He submits that principly the case of the plaintiff defending rejection of the plaint as barred by limitation is based upon subsequent revealing of fraud or concealment, therefore, in view of Section 17(1)(b) of the Act of 1963, knowledge of such concealment of fraud, when read with Order VII Rule 4 CPC, the plaintiff was bound to disclose the date of knowledge in the plaint and, in absence thereof, the plaint was liable to be rejected. In support of his submissions, he has placed reliance upon the judgment of Hon'ble Supreme Court in S**aranpal Kaur Anand v. Praduman Singh Chandhok, (2022) 8 S.C.C. 401**; another judgment of Delhi High Court in **Smt. Razia Begum v. Delhi Development Authority & ors., 2014 SCC OnLine Del 4628** and judgment of this Court in **Dr. Chandra Mohan Singhal and others v. State of U.P., 2002 (4) AWC 2686.**

5. *Per contra,* Shri Rahul Sripat, learned Senior Counsel refers to 'paragraph 14' of the plaint and submits that previous proceedings of mutation were not based upon registered instruments, declaration whereabout has been claimed in the suit, rather the mutation was claimed on the basis of long possession only and it is, for the first time, that the plaintiff received a notice dated 29.12.2021 issued by the concerned Municipal Corporation whereupon he came to know about the registered gift deeds. He submits that the said notice was filed alongwith list of documents before the trial court and, in the facts of the case, the appellate court has not

erred in treating the question of limitation as a "mixed question fact and law" and has rightly remanded the matter to the trial court for deciding all the issues including the issue of limitation.

6. Having heard learned counsel for the parties, first of all, the Court deals with the provisions of Order VI Rule 4 C.P.C. pressed into service. The same reads as under:-

**Order VI Rule 4**

**"Particulars to be given where necessary.-** In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, and in other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading."

7. Section 17 of the Act of 1963 also needs reproduction:-

**"17. Effect of fraud or mistake.-** (1) Where, in the case of any suit or application for which a period of limitation is prescribed by this Act,-

(b). the knowledge of the right or title on which a suit or application is founded is concealed by the fraud of any such person as aforesaid; or"

8. A conjoint reading of both the aforesaid provisions would show that when the plea of subsequent acquisition of knowledge or revealing of concealment or fraud is taken by the plaintiff so as to bring his suit within period of limitation, it is incumbent for him to state in the plaint as to when he acquired knowledge. Order VI Rule 4 C.P.C. provides that dates and items in relation to the plea of misrepresentation, fraud, breach of trust, wilful default or undue influence shall be mentioned in the plaint.

9. The judgment of **Saranpal Kaur Anand** (supra), had arisen from rejection of plaint on the ground of limitation. Though the Hon'ble Supreme Court has referred the matter to the Larger Bench, however, it appears from 'paragraph 61' of the judgment that it was on the issue as to whether the question of limitation can be decided on the preliminary issue in terms of Order XIV Rule 2(2) C.P.C. There being no quarrel with the proposition laid down in the cited judgment, however, in the peculiar facts of this case when the plaintiff has come up with a clear stand that earlier proceedings of mutation were not based upon gift deeds and, for the first time, the plaintiff acquired knowledge about the rights claimed by the defendant on the basis of the gift deed(s) pursuant to notice issued by the Municipal Corporation in the year 2021, such an aspect has a material bearing on the issue of limitation. Though it is true that in 'paragraph 14' of the plaint, the date of acquisition of knowledge about the gift deed has not been disclosed, however, receipt of notice issued by Nagar Nigam concerning mutation proceedings and words "conspiracy etc." are clearly mentioned. Under such circumstances, even if, a date of receipt of notice has been missed from being mentioned in the plaint, the same does not affect the plaintiff's right to seek amendment in the plaint to that extent when the notice is already on record. This Court, further, does not find any quarrel between the provisions of Order VI Rule 4 CPC and Order VI Rule 17 CPC and no such authority has been placed before the Court which restricts the right of the plaintiff to subsequently amend his plaint,

even if, the date about revealing of concealment or fraud is missed from being mentioned in the plaint initially filed but the document is before the Court on the date of consideration of application under Order VII Rule 11 CPC.

10. The Delhi High Court in **Smt. Razia Begum** (supra), while discussing the aspect of rejection of plaint under Order VII Rule 11 CPC, has observed that for the said purpose, the Court has to look at the averments made in the plaint by taking the same as correct on its face value as also the documents filed in support thereof and at so many places in the judgment, it has been emphasized that the entire plaint must be read as a whole. In the instant case, the notice dated 29.12.2021 issued by the concerned Municipal Corporation has already been brought on record before the trial court by the plaintiff himself. The entire plaint, when read as a whole alongwith the said notice, would give rise to an arguable issue of limitation vis-a-vis actual acquisition of knowledge to the plaintiff about the disputed gift deed(s). Therefore, the appellant does not get any advantage from the decision of **Smt. Razia Begum** (supra) and, infact, the same would apply against him in the facts of the present case.

11. The judgment in **Dr. Chandra Mohan Singhal and others** (supra) arises out of a case where the particulars regarding alleged fraud were not disclosed in the plaint and this Court, in paragraph 25 of the report, observed that on perusal of the plaint of the suit, no details of fraud were found to be given nor was it mentioned as to who had committed the fraud. The Court, accordingly, observed that the plaint was bad under Order VI Rule 4 CPC and, hence, was liable to be rejected. The facts of the instant case are, however, different and the only issue involved before this Court is as to whether on the statement of facts contained by reading the entire plaint read with the notice dated 29.12.2021, it can be said at this stage that the provisions of Order VI Rule 4 CPC would apply in strict sense so as to reject the plaint at its threshold. In view of the above discussion, this Court cannot read the judgment of **Dr. Chandra Mohan Singhal and others** (supra) in favour of the appellant.

12. At the same time, it is also observed that if the defendant-appellant successfully establishes during the course of trial that previous proceedings of mutation were based upon disputed gift deeds and that the plaintiff had knowledge about such proceedings, certainly, the suit would be barred by limitation but, at this stage, when the evidence is yet to be led on all the disputed questions of fact and law, question of limitation cannot be said to be a pure question of law so as to justify rejection of plaint at its threshold.

13. In view of the above, this Court is convinced that the first appellate court was justified in leaving the question of limitation to be decided as a mixed question of fact and law after leading the evidence.

14. Consequently, the appeal fails and is, accordingly, **dismissed**.

15. However, it is clarified that the findings/observations recorded in order dated 22.11.2022 passed by the trial court or the order dated 06.04.2023 passed by the first appellate court shall not be treated as final and would not affect the ultimate decision of the Court on the question of limitation.

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**(2024) 11 ILRA 155**
**APPELLATE JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 07.11.2024**

**BEFORE**

**THE HON'BLE KSHITIJ SHAILENDRA, J.**

First Appeal From Order No. 147 of 2024

**Kaniz Fatima ...Plaintiff/Appellant**
**Versus**
**Imran Khan ...Defendant/Respondent**

**Counsel for the Appellant:**
Sri Pranab Kumar Ganguli

**Counsel for the Respondent:**
Sri Sheikh Moazzam Inam

**(A) Civil Law - Payment of Court Fees - Court Fees Act, 1870 - Sections 6-A - Appeal, Section 7(iv-A) - For cancellation or adjudging void instruments and decrees - Residuary Article - Ad-valorem Fees - Defendant has a statutory right to raise all objections regarding valuation and deficiency in court fees - suit seeking to declare a gift deed null, void, and forged falls under Section 7(iv-A) of the Court Fees Act and not under the residuary Article 17(iii) - Objections to court fees raised by a defendant are permissible under Section 6(4) of the Act. (Para - 12,15,18)**

**(B) Interpretation of Statute - Distinction between Article 17(iii) and Section 7(iv-A) - Section 7(iv-A) - applies to cases involving adjudging instruments void - Article 17(iii) - applies to declaratory relief without consequential relief. (Para - 8,9,10,12)**

Appellant filed a suit against her son - alleging that under the guise of executing a power of attorney - a fraudulent gift deed was registered - sought a declaration that deed was null, void, and forged - no consequential relief was claimed - suit has been correctly valued - Plaintiff has not deposited ad-valorem Court fees on market value of property - trial court directed appellant to pay ad-valorem court fees under Section 7(iv-A) of Court Fees Act - hence present appeal.(Para 1-4 )

**HELD: -** Court upheld the trial court's direction to pay ad-valorem fees under Section 7(iv-A), affirming that objections to court fees by the defendant are permissible under the Court Fees Act. (Para -19,20)

**Appeal dismissed**. (E-7)

**List of Cases cited:**

1. Ratnavaramaraja Vs Vimla, AIR 1961 SC 1299

2. Suhrid Singh @ Sardool Singh Vs Randhir Singh & ors., (2010) 12 SCC 12

3. Shailendra Bharadwaj & ors. Vs Chandra Pal & anr., (2013) 1 SCC 57

4. Agra Diocesan Trust Association Vs Anil David & ors., AIR 2020 SC 1372

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

The Proceedings:
Appeal under section 6-A of the Courts Fees Act, 1870

1. Heard Shri P.K. Ganguli, learned counsel for the plaintiff-appellant and Shri Sheikh Moazzam Inam, learned counsel for the sole-respondent.

2. The instant appeal under Section 6-A of the Court Fees Act, 1870 (hereinafter referred to as 'the Act of 1870') at the instance of plaintiff of Original Suit No.576 of 2021 (Kaniz Fatima v. Imran Khan) questions correctness and legality of the order dated 13.12.2023 whereby the learned Civil Judge, (Senior Division), Gorakhpur has decided the issue No.2 holding that though the suit has been

correctly valued, the plaintiff has not deposited *ad-valorem* Court fees on market value of the property and, therefore, she has been called upon to deposit the *ad-valorem* Court fees.

Submissions of the appellant:

3. Challenging the order impugned, Shri Ganguli submits that the defendant-respondent is son of the plaintiff-appellant and he committed a fraud in the manner that under the garb of getting executed a power of attorney from the appellant, he got executed and registered a gift deed dated 07.04.2021 and the appellant, having come to know about the fraud, instituted the suit in question claiming a decree for declaration to the effect that the gift deed be declared as null, void, forged and fabricated having no effect on the rights of the plaintiff and consequential information in this regard be sent to the Sub-Registrar's office.

4. Argument is that such a relief claimed falls under Article 17 (iii) of Schedule II of the Act of 1870, as applicable in the State of Uttar Pradesh, inasmuch as, the appellant had not claimed any consequential relief and, therefore, fixed amount of Court fees deposited by her was sufficient. He further submits that the court below has wrongly invoked Section 7(iv-A) of the Act of 1870 which applies only for cancellation of an instrument, which is not the situation here. Shri Ganguli has further urged that the defendant has no right to raise any objection in the matter of Court fees and, in this regard, reliance has been placed upon judgment of Supreme Court in the case of **Ratnavaramaraja v. Vimla, AIR 1961 SC 1299.**

Submissions of the respondent:

5. *Per contra*, learned counsel for the respondent submits that since the plaintiff has claimed relief for adjudging the instrument of gift as null and void, the Court fees would be payable as per Section 7(iv-A) of the Act of 1870 and residuary Article 17(iii) of Schedule II would not apply. He, therefore, supports the order impugned.

Analysis of rival contentions:

6. Having heard learned counsel for the parties, the Court finds that the trial court has passed the order impugned after taking into consideration the following Authorities:-

**(i). Suhrid Singh @ Sardool Singh v. Randhir Singh & others, (2010) 12 SCC 12;**

**(ii). Shailendra Bharadwaj & others v. Chandra Pal & another, (2013) 1 SCC 579;**

**(iii). Agra Diocesan Trust Association v. Anil David and others, AIR 2020 SC 1372;**

7. Although the judgment of **Suhrid Singh @ Sardool Singh** (supra) is not applicable in the State of Uttar Pradesh as the said case had arisen out of State of Punjab, where different Rules of Court fees exist, the Supreme Court in the case of **Shailendra Bharadwaj & others** (supra), has extensively dealt with the provisions of Court Fees Act, 1870 in a case where instrument is sought to be adjudged as null and void and has clearly held that in such situation, Section 7(iv-A) would be applicable. The judgment of **Shailendra Bharadwaj & others** (supra) has further

been relied in **Agra Diocesan Trust Association** (supra).

8. Now dealing with the argument of Shri Ganguli that residuary Article 17(iii) would apply, it is first necessary to refer the said Article which reads as under:-

"17(iii) To obtain a declaratory decree where no consequential relief is prayed in any suit, not otherwise provided for by this Act."

9. At the same time, Section 7(iv-A) of the Act of 1870 needs reproduction as under:-

"(iv-A) For cancellation or adjudging void instruments and decrees. In suit for or involving cancellation of or adjudging void or voidable a decree for money or other property having a market value, or an instrument securing money or other property having such value:

(1) where the plaintiff or his predecessor-in-title was a party to the decree or the instrument, according to the value of the subject-matter, and

(2) where he or his predecessor-in-title was not a party to the decree or instrument, according to one-fifth of the value of the subject matter, and such value shall be deemed to be-

if the whole decree or instrument is involved in the suit, the amount for which or value of the property in respect of which the decree was passed or the instrument executed, and if only a party of the decree or instrument is involved in the suit, the amount or value of the property to which such part relates.

Explanation - The value of the property for the purposes of this sub-section shall be the market-value, which in the case of immovable property shall be deemed to be the value as computed in accordance with sub-sections (v), (v-A) or (v-B), as the case may be."

10. A perusal of Article 17 (iii) of Schedule II shows that it applies in a case where a declaratory decree is sought to be obtained without claiming any consequential relief, however, the language used in the article is clear and unambiguous to the effect that such a suit is "not otherwise provided for by this Act". Meaning thereby that if a suit is otherwise covered by any other provision in the Act, 1870, the aforesaid residuary clause would not apply.

11. In the instant case, relief claimed is for adjudging the gift deed as null, void as well as forged and fabricated. In this view of the matter it is not a simplicitor suit for declaration of rights and it clearly falls under section 7(iv-A) of the Act which is specifically otherwise provided in the Act.

12. In **Ajay Tiwari v. Hriday Ram Tiwari and others, 2006 (4) AWC 3546 (DB),** a Division Bench of this Court dealt with the conflict in between Article 17(iii) of Schedule II and Section 7(iv-A) of the Act of 1870 and held that in a suit for declaring a sale deed as null and void, the Court fees would be payable as per Section 7(iv-A) of the Act and not as per Article 17(iii).

13. Now testing the submission of Shri Ganguli as regards right of a defendant to raise objection in Court fees matter, this Court deems it appropriate to refer Sections 6(3) and 6(4) of the Act of 1870 which read as under:-

"6 (3). If a question of deficiency in court-fee in respect of any plaint or

memorandum of appeal is raised by an officer mentioned in Section 24-A the Court shall, before proceeding further with the suit or appeal, record a finding whether the court-fee paid is sufficient or not. If the Court finds that the court-fee paid is insufficient, it shall call upon the plaintiff or the appellant, as the case may be, to make good the deficiency within such time as it may fix, and in case of default shall reject the plaint or memorandum of appeal:

6(4). Whenever a question of the proper amount of court-fee payable is raised otherwise than under sub-section (3), the Court shall decide such question before proceeding with any other issue."

14. The aforesaid provisions clearly provide adjudication of objection raised in relation to sufficiency of Court fees. Such objection can be raised by two category of persons; one, by the officers mentioned under Section 24-A of the Act and the other, by the persons other than those mentioned in the said provision. For a ready reference, Section 24-A of the Act is reproduced as under:-

**"24-A. Control of court-fee and Stamp Commissioner.-(**1) The levy of fees under this Act shall be under the general control and superintendence of the Chief Controlling Revenue Authority, who may be assisted in their supervision thereof by the Commissioner of Stamps and by as many Assistant Commissioners of Stamps, Deputy Commissioners of Stamps and Assistant Commissioners of Stamps as the State Government may appoint in this behalf of by any other subordinate agency appointed for the purpose.

(2). The officers and the agency referred to in sub-section (1) shall have access to all records, and shall be furnished with all such information as may be required by them for the performance of their duties under this Act."

15. In the instant case, the defendant-respondent falls under the category described under Section 6(4) of the Act of 1870 and, therefore, he certainly had a statutory right to raise objections and the Court was bound to decide the same. In this regard the Division Bench in paragraph 13 of **Ajay Tiwari** (supra) has held as under:-

"13. The learned Counsel for the plaintiff/appellant faintly argued that it is not open for the defendants/respondents to take any objection with regard to the inadequacy or deficiency in payment of court fees. The above submission has no merits as the question of deficiency or payment of proper amount of court fees can also be raised otherwise than by the officers of the State or the Revenue. Section 6(4) of the Act stipulates that whenever a question of proper amount of court fees payable is raised otherwise than under Sub-section (3) of Section 6, i.e., by person other than the officers mentioned in Section 24-A of the Act, the Court shall decide such question before proceedings with any other issue. Thus, the Court is empowered to decide the question of payment of proper amount of court fees even if it has not been raised by the officers of the State or Revenue. Therefore, the submission has no force and is not acceptable more particularly as the same was not even raised in the court below. "

16. As far as reliance placed by learned counsel for the appellant on **Ratnavaramaraja** (supra), it is observed that the Apex Court, in that case, was dealing with maintainability of revision before the High Court at the instance of a defendant who was aggrieved by

determination of an issue regarding valuation of property and Court fees. The Supreme Court held that whether proper Court fees is paid on a plaint is primarily a question between the plaintiff and the State and, even if, the defendant may believe and even honestly that proper Court fees has not been paid by the plaintiff, he has still no right to move the superior Court by way of appeal or revision and, therefore, it was held that High Court had grievously erred in entertaining the question of Court fees at the instance of defendants in revision-application filed under Section 115 CPC.

17. The instant case has not been filed by a defendant but it is a statutory appeal preferred by the plaintiff when the order has been passed against her. Therefore, with due respect to the decision of Apex Court in **Ratnavaranaraja** (supra), the same has no application in the fact situation involved in the present case. Further, the ratio laid down in **Ratnavaranaraja** (supra), was re-considered by the Apex Court in Shamsher Singh v. Rajinder Prasad and others, AIR 1973 SC 2384 and considering both the decisions, the Division Bench of this Court, in **Ram Krishna Dhandhania and another v. Civil Judge (Senior Division), Kanpur Nagar and others, 2005 (3) AWC 2751(DB)** has held in paragraph 13 as under:-

"13. In **Sri Rathnavarmaraja v. Smt. Vimla, AIR 1961 SC 1299,** the Hon'ble Supreme Court held that whether proper court-fee has been paid or not, is an issue between the plaintiff and the State and that the defendant has no right to question it in any manner. The said judgment of the Apex Court was reconsidered and approved in **Shamsher Singh v. Rajinder Prasad and others, AIR 1973 SC 2384,** observing as under :- -

"The ratio of that decision was that no revision on a question of court fee lay where no question of jurisdiction was involved."

18. The Division Bench, in the same judgment of **Ram Krishna Dhandhania and another (supra),** as regards right of a defendant to raise objections on valuation and deficiency in court fees, held in 'paragraph 19' as under:-

"19. Thus, in view of the above, the legal position can be summarized that the defendant has a right to raise all objections on the valuation and deficiency of the court-fees. The matter is to be adjudicated upon and decided by the Court under Section 12 of the Act, 1870 and the decision so taken by the trial Court shall be final. The defendant cannot raise the grievance against the said decision unless the valuation suggested by him affects the jurisdiction of the Court. However, the appellate or revisional Court always can test the issue suo motu and make the deficiency good as the purpose of the Act is not only fixing the pecuniary jurisdiction of the Court but also creating revenue for the State."

Conclusion:

19. In view of the above discussion on facts and law, this Court does not find any error in the order impugned.

20. The appeal is, accordingly, **dismissed**. Interim order, granted earlier, stands vacated.

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**(2024) 11 ILRA 160**
**APPELLATE JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 14.11.2024**

**BEFORE**

**THE HON'BLE KSHITIJ SHAILENDRA, J.**

First Appeal From Order No. 1903 of 2023

**Smt. Omika Devi ...Appellant**
**Versus**
**Indian Bank (Allahabad Bank) Branch & Ors. ...Respondents**

**Counsel for the Appellant:**
Sri H.K. Asthana, Sri Harish Kumar Tripathi

**Counsel for the Respondents:**
Sri Habib Ahmad

**(A) Civil Law - Partition and Injunction - Civil Procedure Code, 1908 - Order XLIII Rule 1(r) - Specific Relief Act, 1963 - Section 41(h); Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 - Sections 13(2), 13(4) & 17 - Alternative remedies under specific statutes - Civil suits are barred when alternative efficacious remedies are available under the SARFAESI Act - Partition suit - Secured assets - Security interest - Injunction under U.P. CPC Amendment, SARFAESI Act - Grant of injunction is not, otherwise, permissible in view of U.P. amendment made under Order XXXIX Rule 2 C.P.C. as per which an injunction which cannot be granted under the Specific Relief Act, 1963, the same cannot be granted under C.P.C. - An injunction cannot be granted if an equally efficacious legal remedy is available, as per Section 41(h) of the Specific Relief Act, 1963 - Any order for injunction granted in contravention of these provisions shall be void. (Paras 3 -12)**

Appellant, claiming a 1/3rd share in immovable property - mortgaged by co-sharers (respondents) - sought an injunction against the bank - from auctioning the property without partition - civil court rejected application. (Paras 3–5)

**HELD: -** Appeal lacks merit as statutory remedies are available under the SARFAESI Act. Application for injunction was correctly rejected. Dismissal does not affect the appellant's right to pursue other legal remedies. Appellant has a remedy of approaching the Debts Recovery Tribunal independently or by seeking her implement in the pending Securitisation Application. (Paras 9 - 12)

**Appeal dismissed.** (E-7)

**List of Cases cited:**

1. Jagdish Singh Vs Heeralal & ors., (2014) 1 SCC 479

2. U.B.O.I. Vs Satyavati Tondon & ors., (2010) 8 SCC 110

3. Sree Anandhakumar Mills Ltd. Vs I.O.B.& ors., 2019 (1) Supreme 514

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

1. Heard Shri H.K. Asthana, learned counsel for the plaintiff-appellant and Shri Habib Ahmad, learned counsel for the respondent No.1-Bank.

2. Counter and rejoinder affidavits in between the appellant and respondent No.1 have been exchanged. In view of the order proposed to be passed, it is not necessary to issue notice to the remaining respondents, particularly when the matter is running in the list of fresh cases for the last one year.

3. The instant appeal under Order XLIII Rule 1(r) of Civil Procedure Code, 1908 assails the validity of order dated 19.10.2023 whereby the learned Civil Judge, (Senior Division), Gorakhpur has

rejected the plaintiff's injunction application in Original Suit No.186 of 2022 (Smt. Omika Devi v. Indian Bank (Allahabad Bank) and others).

4. Assailing the order impugned, learned counsel for the appellant submits that though the appellant is having 1/3rd share in an immovable property, the respondent Nos. 2 and 3 i.e. real brother and mother of the appellant have created mortgage in favour of respondent No.1-Bank and availed financial facility.

5. The contention is that seeking partition of the property, Original Suit No.2175 of 2023 (Smt. Omika Devi v. Om Kailash Pati and another) was filed by the appellant which is pending before the civil court. It is contended that when the Bank proceeded to auction the mortgaged property, plaintiff instituted Original Suit No.186 of 2022 claiming a decree for injunction only to the extent that without effecting partition between the co-sharers of the property, the Bank be restrained from taking possession over the property, from auctioning the same and from causing any interference in possession and user of the property. By referring to the definitions of "secured assets" and "security interest", respectively contained in Section 2(zc) and (zf) read with Section 13 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as 'the Act of 2002'), learned counsel for the appellant vehemently argued that, in the instant case, the appellant cannot be relegated to avail remedy under the Act of 2002 and, inasmuch as, the Debts Recovery Tribunal is not competent to determine the respective shares of co-sharers of immovable property. He, therefore, submits that until and unless a decree of partition is drawn in Original Suit No.2175 of 2023, the appellant is entitled for injunction.

6. *Per contra*, Shri Habib Ahmad, learned counsel for the respondent-Bank submits that Bank has already proceeded with auction proceedings pursuant to notices issued under Section 13(2) and 13(4) of the Act and in view of Section 17 of the Act of 2002, any person (including borrower), aggrieved by any of the measures referred to in Section 13(4), may make an application before Debts Recovery Tribunal agitating his grievance. He places reliance upon judgment of the Hon'ble Supreme Court in **Jagdish Singh v. Heeralal and others, (2014) 1 SCC 479.** The relevant 'paragraphs 17 and 18' of the same are reproduced as under :-

"17. The expression 'any person' used in Section 17 is of wide import and takes within its fold not only the borrower but also the guarantor **or any other person who may be affected by action** taken under Section 13(4) of the Securitisation Act. Reference may be made to the Judgment of this Court in **Union Bank of India v. Satyavati Tondon and others, (2010) 8 SCC 110.**

18. Therefore, the expression 'any person' referred to in Section 17 would take in the plaintiffs in the suit as well. Therefore, irrespective of the question whether the civil suit is maintainable or not, under the Securitisation Act itself, a remedy is provided to such persons so that they can invoke the provisions of Section 17 of the Securitisation Act, in case the bank (secured creditor) adopt any measure including the sale of the secured assets, on which the plaintiffs claim interest. "

7. He further submits that borrowers have already preferred Securitisation Application No.838 of 2023 which is pending before the Debts Recovery Tribunal. In rejoinder, learned counsel for appellant submits that property has not yet

been sold and present appellant has not been impleaded as a party before D.R.T.

8. Having heard learned counsel for the parties, this Court is of the considered view that scope of proceedings under Section 17 of the Act of 2002 is quite large and applicant of such proceedings can be any person including borrower, gaurantor or any person who may be affected by action taken under Section 13(4) of the Act. The Apex Court in **Jagdish Singh** (supra) has elaborately dealt with the said provision. The judgment of **Jagdish Singh** (supra) has been followed in **Sree Anandhakumar Mills Ltd. v. Indian Overseas Bank & others, 2019 (1) Supreme 514.**

9. Apart from this, I find that by the time the Original Suit No.186 of 2022 giving rise to the instant appeal was filed by the appellant, the suit for partition had not been filed by any of the alleged co-sharers and, it is only after one year, the partition suit being Original Suit No.2175 of 2023 was filed. This Court is not inclined to make any observation regarding subsequent institution of suit as an attempt to shield the action taken in pursuance of the Act of 2002, and without expressing any opinion on the maintainability of any suit at this stage when the said question has not yet arisen before the civil court, this Court is of the view that appellant has a remedy of approaching the Debts Recovery Tribunal independently or by seeking her impleadment in the pending Securitisation Application No.838 of 2023.

10. Here I may emphasise that grant of injunction is not, otherwise, permissible in view of U.P. amendment made under Order XXXIX Rule 2 C.P.C. as per which an injunction which cannot be granted under the Specific Relief Act, 1963 (hereinafter referred to as 'the Act of 1963'), the same cannot be granted under C.P.C. The Court may refer to Section 41(h) of the Act, 1963 according to which availability of equally efficacious relief would result in refusal to grant injunction. For a ready reference, relevant U.P. amendment in Order XXXIX Rule 2 CPC and Section 41(h) of the Act of 1963 are reproduced as under:-

**Code of Civil Procedure, 1908**
**Order XXXIX Rule 2 (U.P. Amendment)**

"Uttar Pradesh.-In its application to the State of Uttar Pradesh, in Rule 2, in sub-rule (2), the following proviso shall be inserted, namely:-

"Provided that no such injunction shall be granted-

(a) where no perpetual injunction could be granted in view of the provisions of Section 38 and Section 41 of the Specific Relief Act, 1963 (Act 47 of 1963), or

……"

and any order for injunction granted in contravention of these provisions shall be void".

**The Specific Relief Act, 1963**
**"Section 41(h)-Injunction when refused**

When equally efficacious relief can certainly be obtained by any other usual mode of proceeding except in case of breach of trust;"

11. For all the aforesaid reasons, I do not find any error in the order rejecting injunction application.

12. The appeal has no merit and is, accordingly, **dismissed**, however, without affecting the appellant's right to avail other remedies available under the law.

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**(2024) 11 ILRA 163**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 08.11.2024**

**BEFORE**

**THE HON'BLE KSHITIJ SHAILENDRA, J.**

Civil Misc. Transfer Application (U/s 24 C.P.C.)
No. 674 of 2024

**Smt. Shivika Upadhayay ...Applicant**
**Versus**
**Pushpendra Trivedi ...Opposite Party**

**Counsel for the Applicant:**
Sri Sandeep Kumar

**Counsel for the Opposite Party:**

**A. Civil Law - Civil Procedure Code,1908-Section 24-Hindu Marriage Act,1955-Section 13(1)(a)-The Allahabad high court addressed the issue of territorial jurisdiction between its Principal Seat and the Lucknow Bench concerning matrimonial cases transfers under section 13(1)(a) of the Hindu Marriage Act,1955-the applicant sought to transfer a matrimonial case from Family Court in Lucknow to the District Court in Bareilly-The court reviewed sections 22,23 and 24 of CPC, which address the power to transfer civil cases –It also analyzed the Family Courts Act,1984, and its implications for territorial jurisdiction-Held, transfer applications for cases pending within the territorial jurisdiction of the Lucknow Bench must be filed before the Lucknow Bench, as it is the appellate forum for such cases under sections 22-24 of Civil Procedure Code, and the Family Court s Act 1984.(Para 1 to 16)**

**Every court has its own local or territorial limits beyond which it cannot exercise the jurisdiction. So far as this court is concerned, its jurisdiction is not circumscribed by any territorial limitation and it extends over any person or authority within the territory of India. But it has no jurisdiction outside the country. So far as a High Court is concerned its jurisdiction is limited to territory within which it exercises jurisdiction and not beyond it. On that analogy also, a High court cannot pass an order transferring a case pending in a court subordinate to it to a court subordinate to another High Court. It would be inconsistent with the limitation as to territorial jurisdiction of the Court.(Para 14)** (E-6)

**List of Cases cited:**

1. Nasiruddin Vs S.T.A.T. (1975) 2 SCC 671

2. Rajendra Kr. Mishra Vs U.O.I. & ors. (2005) 1 UPLBEC 108

3. St. of Raj. Vs M/s Swaika Properties (1985) 3 SCC 217

4. U.P. Rashtriya Chini Mill Adhikari Parishad Vs St. of U.P. (1995) 4 SCC 738

5. Navinchandra N. Majithia Vs St. of Mah.(2000) 7 SCC 640

6. Ambica Industries. Vs Commr. Of Central Excise (2007) 6 SCC 769

7. Alchemist Ltd. Vs St. Bank of Sikkim(2007) 11 SCC 335

8. Rajendra Chingravelu Vs R.K. Mishra (2010) 1 SCC 457

9. Naval Kishore Sharma Vs U.O.I. (2014) 9 SCC 329

10. Kusum Ingots & Alloys Ltd. Vs U.O.I. (2004) 6 SCC 254

11. Dr. Manju Varma Vs St. of U.P. & ors., SC in Civil Appeal No. 8290 of 2002

12. Shah Newaz Khan & ors. Vs St. of Nagaland & ors. (2023) 11 SCC 376

13. Durgesh Sharma Vs Jayshree (2008) 9 SCC 648

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

ON THE ISSUE OF TERRITORIAL JURISDICTION OF PRINCIPAL SEAT OF ALLAHABAD HIGH COURT AND ITS LUCKNOW BENCH IN MATTERS OF TRANSFER OF MATRIMONIAL CASES

1. Heard Shri Sandeep Kumar, learned counsel for the applicant.

2. Prayer to transfer Case No. 303 of 2024 (Pushpendra Trivedi vs. Smt. Shivika Upadhyay) under Section 13(1)(a) of Hindu Marriage Act, 1955 from Principal Judge, Family Court, Lucknow to District Bareilly has been made in this application.

3. The Stamp Reporting Section has submitted a report regarding non-maintainability of the transfer application on the ground that the case is pending under the territorial jurisdiction of the Lucknow Bench.

4. Learned counsel for the applicant submits that since part of cause of action has arisen within the territorial limits of jurisdiction of this Court, i.e. the Principal seat, the transfer application is maintainable as it is the choice of the applicant to choose forum.

5. Many applications seeking transfer of proceedings pending in family courts functoning in territorial limits of jurisdiction of Lucknow Bench are coming up for consideration at the Principal seat and in almost all cases, plea of "arising of part of cause of action" within territorial limits of Principal seat at Allahabad is taken. In this view of the matter, this Court deems it appropriate to deal with this issue in some details.

6. This Court may observe that whatever arguments are advanced either taking a plea of "part of cause of action" or "forum convenience", the same are based upon certain authorities which have dealt with the issue of territorial jurisdiction in relation to writ petitions filed under Article 226 of the Constitution of India. This is so because sub-clause (2) of Article 226 of the Constitution provides that power conferred by clause (1) of the said article to issue directions, orders or writs may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power. The Court may refer to certain authorities discussed and referred time and again by this Court in various judgments. Some of these authorities are as under:

**"i. Nasiruddin vs. State Transport Appellate Tribunal reported in (1975) 2 SCC 671**

**ii. Rajendra Kumar Mishra vs. Union of India & others reported in [(2005) 1 UPLBEC 108**

**iii. State of Rajasthan vs. M/s. Swaika Properties reported in (1985) 3 SCC 217**

**iv. U.P. Rashtriya Chini Mill Adhikari Parishad vs. State of U.P. reported in (1995) 4 SCC 738**

**v. Navinchandra N. Majithia vs. State of Maharashtra reported in (2000) 7 SCC 640**

**vi. Ambica Industries vs. Commissioner of Central Excise reported in (2007) 6 SCC 769**

**vii. Alchemist Ltd. vs. State Bank of Sikkim reported (2007) 11 SCC 335**

**viii. Rajendra Chingravelu vs. R.K. Mishra reported in (2010) 1 SCC 457**

**ix. Nawal Kishore Sharma vs. Union of India reported in (2014) 9 SCC 329**

**x. Kusum Ingots & Alloys Ltd. vs. Union of India reported in (2004) 6 SCC 254**

**xi. Judgment dated 17.11.2004 passed by Supreme Court in Civil Appeal No.8290 of 2002 (Dr. Manju Varma Vs. State of U.P. and others)"**

7. The aforesaid authorities deal with territorial limits of jurisdiction of a writ court under Article 226 of the Constitution of India and as regards Allahabad High Court, provisions of U.P. High Courts (Amalgamation) Order 1948 have been dealt with along with concept of Forum Convenience and arising of cause of action, wholly or in part. However, in order to examine as to whether in matrimonial matters, when transfer is sought on the basis of convenience of the parties or other like grounds such as place of temporary or permanent residence of one of the parties or pendency of certain cases in one or the other districts, provisions of Code of Civil Procedure, 1908 read with Family Courts Act, 1984 must be dealt with, otherwise the confusion regarding territorial jurisdiction in such matters would continue to prevail.

8. Power to transfer suit or proceedings of civil cases is contained under Section 24 of C.P.C., which reads as under:-

**Section 24. General power of transfer and withdrawal.** (1) On the application of any of the parties and after notice to the parties and after hearing such of them as desired to be heard, or of its own motion without such notice, the High Court or the District Court may at any stage-

(a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any Court subordinate to it and competent to try or dispose of the same, or

(b) withdraw any suit, appeal or other proceeding pending in any Court subordinate to it, and

(i) try or dispose of the same; or

(ii) transfer the same for trial or disposal to any Court subordinate to it and competent to try or dispose of the same; or

(iii) retransfer the same for trial or disposal to the Court from which it was withdrawn.

(2) Where any suit or proceeding has been transferred or withdrawn under sub-section (1), the Court which 1 is thereafter to try or dispose of such suit or proceeding may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.

[(3) For the purposes of this section-

(a) Courts of Additional and Assistant Judges shall be deemed to be subordinate to the District Court;

(b) proceeding includes a proceeding for the execution of a decree or order].

(4) The Court trying any suit transferred or withdrawn under this section from a Court of Small Causes shall, for the purposes of such suit, be deemed to be a Court of Small Causes.

[(5) A suit or proceeding may be transferred under this section from a Court which has no jurisdiction to try it.]

9. The Court must, simultaneously, refer to Sections 22 and 23 of the Code which read as under:-

**"Civil Procedure Code, 1908**

**Section 22. Power to transfer suits which may be instituted in more than one Court.**

Where a suit may be instituted in any one of two or more Courts and is instituted in one of such Courts, any defendant, after notice to the other parties, may, at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, apply to have the suit transferred to another Court, and the Court to which such application is made, after considering the objections of the other parties (if any), shall determine in which of the several Courts having jurisdiction the suit shall proceed.

**Section 23. To what Court application lies.**

(1) **Where the several Courts having jurisdiction are subordinate to the same Appellate Court,** an application under section 22 shall be made to the Appellate Court.

(2) Where such Courts are subordinate to different Appellate Courts but to the same High Court, the application shall be made to the said High Court.

(3) Where such Courts are subordinate to different High Courts, the application shall be made to the High Court within the local limits of whose jurisdiction the Court in which the suit is brought is situate."

10. Words "Appellate Court" used in Section 23(1) of CPC are of much significance. While advancing arguments based upon Forum Convenience or arising of cause of action in transfer matters, it is always urged that since there is a single High Court in the State of U.P., all the Family Courts are subordinate to the High Court and, hence, transfer application can be filed either before the Principal Seat of this Court or its Lucknow Bench. However, sub-section (1) of Section 23 makes it clear that subordination of courts in the matters of transfer has to be understood in the light of "**Appellate Court**". For example, if an order is passed by a Family Court situated in Gonda or Basti or Sitapur or any other district falling under territorial limits of jurisdiction of Lucknow Bench, appeal under Section 19 of the Family Courts Act, 1984 would lie before the Lucknow Bench and not before the Principal Seat at Allahabad. In such matters, Lucknow Bench being the Appellate Court, transfer application would lie before it and not before the Principal Seat.

**"Civil Procedure Code, 1908**

**Section 2(4)** "district" means the local limits of the jurisdiction of a principal Civil Court of original jurisdiction (hereinafter called a "District Court"), and includes the local limits of the ordinary original civil jurisdiction of a High Court;

**Section 3 – Subordination of Courts-** For the purposes of this Code, the District Court is subordinate to the High Court, and every Civil Court of a grade inferior to that of a District Court and every Court of Small Causes is subordinate to the High Court and District Court."

11. Now, in order to further clarify the power to transfer matrimonial cases, certain provisions of Family Courts Act, 1984 need reference. The same are reproduced as under:-

**Family Courts Act, 1984**

Section 2(d)- "Family Court" means a Family Court established under section 3;

2(e) all other words and expressions used but not defined in this Act and defined in the Code of Civil Procedure,

1908 (5 of 1908) shall have the meanings respectively assigned to them in that Code.

**Section 3**

…….

(2) The State Government shall, after consultation with the High Court, specify, by notification, the local limits of the area to which the jurisdiction of a Family Court shall extend and may, at any time, increase, reduce or alter such limits.

**Section 7. Jurisdiction**.-(1) Subject to the other provisions of this Act, a Family Court shall-

(a). have and exercise all the jurisdiction exercisable by any district court or any subordinate civil court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the Explanation; and

(b) be deemed, for the purposes of exercising such jurisdiction under such law, to be a district court or, as the case may be, such subordinate civil court for the area to which the jurisdiction of the Family Court extends.

12. On perusal of aforesaid provisions of the Act of 1984, it is clear that establishment of a Family Court is as per notification issued by the State Government defining the local limits of the area to which the jurisdiction of a Family Court shall extend. Further, Family Court shall be deemed to a District Court and in view of Section 2(4) of the Code of Civil Procedure, a District Court would confine its jurisdiction as per its local limits and not beyond that. Hence, territories to which any Family Court exercises its jurisdiction would determine the Forum where application seeking transfer of proceedings pending in such areas would lie.

13. The Supreme Court, in **Shah Newaz Khan and others vs. State of Nagaland and others, (2023) 11 SCC 376,** by making reference of its earlier decision in **Durgesh Sharma vs. Jayshree, (2008) 9 SCC 648,** observed that the law relating to transfer of cases (suits, appeals and other proceedings) is well settled. It is found in Sections 22 to 25 of the Code and those provisions are exhaustive in nature. Whereas Sections 22, 24 and 25 deal with power of transfer, Section 23 merely provides forum and specifies the court in which an application for transfer may be made. Section 23 is not a substantive provision vesting power in a particular court to order transfer. It has further been held that where several courts having jurisdiction are subordinate to one appellate court, an application for transfer may be made to such appellate court and the court may transfer a case from one court subordinate to it to another court subordinate to it.

14. In **Durgesh Sharma (supra),** after dealing with the provisions of Sections 22, 23, 24 and 25 CPC, the Supreme Court observed as under:

…. "Every court has its own local or territorial limits beyond which it cannot exercise the jurisdiction. So far as this Court is concerned, its jurisdiction is not circumscribed by any territorial limitation and it extends over any person or authority within the territory of India. But, it has no jurisdiction outside the country. So far as a High Court is concerned, its jurisdiction is limited to territory within which it exercises jurisdiction and not beyond it. On that analogy also, a High Court cannot pass an order transferring a case pending in a court subordinate to it to a court subordinate to another High Court. It would be inconsistent with the limitation as to territorial jurisdiction of the Court".

15. In view of the above discussion of sections 2(4), 3, 22, 23, 24 CPC read with Section 2(d), 2(e) and 7 of the Family Courts Act, this Court is of the considered view that since Lucknow Bench would be the appellate court competent to hear the appeals against an order passed by Family Court situated in any of the courts subordinate to it and functional within its/their territorial limits of jurisdiction, the transfer application in relation to a case pending within those territories shall lie before the Lucknow Bench being the appellate court and not before the principal seat at Allahabad where such an appeal would be incompetent.

16. In view of the above, the instant transfer application before this Bench is not maintainable and it is, accordingly, **rejected**. However, this order will not preclude the applicant to file transfer application before Lucknow Bench.

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**(2024) 11 ILRA 168**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 07.11.2024**

**BEFORE**

**THE HON'BLE ABDUL MOIN, J.**

Writ-A No. 6383 of 2024

**Sachin Srivastava ...Petitioner**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Deep Narayan Tripathi

**Counsel for the Respondents:**
C.S.C., Prashant Kumar Singh

**A. Civil Law – Service Law – Selection and Appointment. Issue: Whether a selected candidate has a right to the post? *Held:* A selected candidate has no vested right to the post, and the State or its instrumentality may, for bona fide reasons, choose not to fill up the advertised vacancies. In the instant case, the petitioner was never declared as a selected candidate; rather, the candidature of the selected candidate was cancelled prior to the issuance of the select list by the respondents. Thereafter, the respondents issued a fresh advertisement. Since fresh advertisement was already been issued, the Court declined to direct the respondents to make selection from the earlier advertisement. (Paras 24, 25, 26)**

**B. Civil Law – Service Law – Challenge to Advertisement for Post. Petitioner challenged advertisement no.3 of 2024 in the month of August 2024, whereas the last date fixed for receipt of applications under the said advertisement was 06.04.2024. *Issue:* Whether the petitioner could challenge advertisement no.3 of 2024 after expiry of the last date for applications? *Held:* If the petitioner was aggrieved by the advertisement, he ought to have challenged it before the last date. As the petitioner chose not to do so and filed the petition only in August 2024—after the selection process had proceeded to a substantial stage—the Court declined to interfere. (Para 27)**

**Dismissed.** (E-5)

**List of Cases cited:**

1. Shankarsan Dash Vs U.O.i. - (1991) 3 SCC 47

2. Tej Prakash Pathak & ors. Vs Rajasthan High Court & ors. – 2024 INSC 847

3. Sanjay Tripathi & anr. Vs District Judge, Hardoi, Service Single No.1893 of 2011 decided on 27.08.2019

(Delivered by Hon'ble Abdul Moin, J.)

1. Rejoinder affidavit filed today in Court is taken on record.

2. Heard Sri Deep Narayan Tripathi, learned counsel for the petitioner, learned Standing Counsel appearing for respondent no.1, and Sri Prashant Kumar Singh, learned counsel appearing for respondents no.2 to 4.

3. Instant petition has been filed praying for the following reliefs:-

*"i. to issue a writ, order or direction in the nature of Mandamus commanding the opposite parties to make selection of the petitioner on the post of Assistant Professor, Agriculture Business Management belonging to general category in order of panel/merit list in the process of selection on said post under Advt. no.9/2021 dated 30.12.2021.*

*ii. to issue a writ, order or direction in the nature of Mandamus commanding the opposite parties to not hold the selection process on the post of Assistant Many Professor, Agriculture Business Management belonging to general category under Advt. no.3/2024 dated 04.03.2024.*

*ii-a. to issue a writ, order or direction in the nature of certiorari quashing the selection and appointment on the post of Assistant Many Professor, Agriculture Business Management belonging to general category through Advertisement No.9/2021.*

*iii. to issue a writ, order or direction to the opposite parties to grant approval of selection and appointment of the petitioner on the post of Assistant Professor, Agriculture Business Management belonging to general category under Advt. no.9/2021 dated 30.12.2021.*

*iv. To issue any other order of direction which this Hon'ble Court may deems fit and proper under the circumstances of the case.*

*v. To allow the writ petition throughout cost."*

4. Learned counsel for the petitioner states that inadvertently while incorporating the amendment as made in prayer 'ii-a' the advertisement number has been indicated as '9/2021' rather the same should be 3 of 2024.

5. The aforesaid statement of learned counsel for the petitioner is recorded.

6. Bereft of unnecessary details, the facts of the case are that an advertisement no.9/2021 dated 30.12.2021 had been issued by respondent no.2, a copy of which is Annexure-1 to the petition, inviting applications for various posts in the University including the post of Assistant Professor, Agriculture Business Management. The number of posts were indicated as three - one for unreserved, one for OBC and one for SC/ST. As the petitioner belongs to the General Category as such he applied for the said post under the unreserved category.

7. It is contended that a written examination was conducted by the respondents in which the petitioner claims to have qualified. Thereafter, interview letter dated 21.11.2022 was issued. The result had been declared on 11.09.2023. Incidentally the result has not been annexed along with the writ petition. It is contended that the result did not contain the name of the petitioner rather one Sri Ashutosh Chaturvedi was selected on the said post. Even before Sri Chaturvedi could be appointed, a complaint was made against

his selection which resulted in his selection being cancelled. It is contended that subsequent thereto, instead of respondents proceeding further with the waiting list, if any, that may have been prepared in which the petitioner might have qualified they have issued an advertisement no.3 of 2024, a copy of which is Annexure-2 to the petition, on 04.03.2024 whereby apart from inviting application on various other posts the post of Assistant Professor, Agriculture Business Management has again been advertised and there are three posts as per earlier advertisement itself.

8. Raising a challenge to the advertisement dated 04.03.2024 no.3 of 2024 as well as praying for selecting the petitioner on the post of Assistant Professor, Agriculture Business Management on the basis of the earlier advertisement no.9 of 2021 the instant petition has been filed.

9. So far as the prayer for making selection on the post concerned in terms of the earlier advertisement no.9 of 2021 the argument of learned counsel for the petitioner is that as the selection of the selected candidate namely Sri Chaturvedi was itself cancelled by the respondents due to he being unqualified consequently the respondents should have activated the waiting list and in case the petitioner found place in the said waiting list he should have been appointed and as such the respondents have patently erred in law in not firstly activating the waiting list and secondly not appointing him from the said waiting list and have patently erred in law in initially selecting an unqualified candidate namely Sri Chaturvedi.

10. Raising a challenge to the advertisement no.3 of 2024 the contention is that the respondents have changed the qualification, so far as it pertains to the post of Assistant Professor, Agriculture Business Management for which they are not possessed of any power to do so. Thus, it is prayed that the advertisement no.3 of 2024, a copy of which is Annexure-2 to the petition, be cancelled and the respondents be required to appoint the petitioner on the basis of earlier advertisement no.9 of 2021.

11. In this regard, reliance has been placed on the judgment of Hon'ble Supreme Court in the case of **Shankarsan Dash vs. Union of India - (1991) 3 SCC 47.**

12. On the other hand, Sri Prashant Kumar Singh, learned counsel appearing for the respondents, argues that admittedly subsequent to the advertisement no.9 of 2021 a fresh advertisement no.3 of 2024 has been issued by the respondents and consequently it is deemed that the earlier advertisement stands cancelled so far as it pertains to the post of Assistant Professor, Agriculture Business Management i.e. the post to which the petitioner is seeking his selection/appointment.

13. Further placing reliance on the judgment of Hon'ble Supreme Court in the case of **Shankarsan Dash (supra)** itself Sri Prashant Kumar Singh argues that the Hon'ble Supreme Court has held that even a selected candidate has got no indefeasible right for being appointed on the post.

14. The contention is that once the selection of Sri Chaturvedi was itself found to be not in accordance with law as he was not qualified on the date of advertisement consequently the respondents in their wisdom have deemed it fit to issue a fresh advertisement inviting fresh applications

vide advertisement no.3 of 2024 and once the petitioner himself does not have any indefeasible right for appointment consequently there is no occasion for the petitioner to seek an appointment in terms of the earlier advertisement no.9 of 2021 more particularly when it stands superseded by fresh advertisement no.3 of 2024.

15. Sri Prashant Kumar Singh, learned counsel appearing for respondents no.2 to 4, has specifically referred to the averments made in paragraphs 7 and 9 of the counter affidavit to contend that the advertisement with respect to the post in question was cancelled even prior to declaration of the result and a fresh advertisement had been issued.

16. So far as the advertisement no.3 of 2024 is concerned, Sri Prashant Kumar Singh argues that the petitioner had not applied in pursuance to the said advertisement and did not even deem it fit to challenge the said advertisement within the last date which was prescribed in the said advertisement which was 06.04.2024 inasmuch as instant petition has been filed on 07.08.2024 and thus the petitioner, at this stage, more particularly when the fresh selection has proceeded further, would not have any right of raising a challenge to the advertisement no.3 of 2024.

17. Responding to the belated challenge to the advertisement no.3 of 2024, learned counsel for the petitioner states that the new qualification which has been prescribed in the advertisement no.3 of 2024 so far as it pertains to the post of Assistant Professor Agriculture Business Management does not conform to the qualification as prescribed by the UGC and changing of the qualification has not been approved by the UGC and as such the petitioner is perfectly within his right to challenge the advertisement as and when he deems fit.

18. Having heard learned counsel for the parties and having perused the records, it emerges that the respondents had initially issued an advertisement no.9 of 2021 dated 30.12.2021 inviting applications to various posts including the post in question. There were three posts of which one post was unreserved. The petitioner finding himself suitable for applying for an unreserved post had applied for the said post. He qualified in the written examination and an interview letter was also issued to him. Upon declaration of the result on 11.09.2023 the name of the petitioner did not find place in the select list rather the name of one Sri Ashutosh Chaturvedi found place in the said select list for the aforesaid post. Even before Sri Chaturvedi could be appointed certain irregularities were noted in his selection inasmuch as Sri Chaturvedi was not having the qualification prescribed on the date of the advertisement and as such his candidature has been cancelled.

19. Incidentally, in the counter affidavit which has been filed on behalf of respondents no.2 to 4 specific averments have been made in paragraphs 7 and 9 of the counter affidavit that the result of the post in question was never declared and the advertisement itself, so far as it pertained to the post in question, had been cancelled prior to declaration of the result and a fresh advertisement for the said post has been issued. Incidentally, the averments made in paragraphs 7 and 9 of the counter affidavit though have been denied in paragraphs 6 and 8 of the rejoinder affidavit by the petitioner yet the petitioner in his wisdom has chosen not to file the said result and in absence thereof the Court has no option but

to believe the version of the respondents that the result had not been declared.

20. The respondents instead of proceeding further with the said advertisement, so far as it pertains to the post in question, deemed it fit to issue a fresh advertisement no.3 of 2024 calling for fresh applications to various posts including the post in question. Admittedly the qualification has been changed. The last date fixed in the advertisement no.3 of 2024 was 06.04.2024. Admittedly the petitioner has not applied in pursuance to the said advertisement as he did not find himself eligible in terms of the said advertisement as he was not having the qualification prescribed. A challenge has only been raised to the advertisement no.3 of 2024 by filing the instant petition which has been filed on 07.08.2024 i.e. after the last date fixed for receipt of the said applications.

21. The first thing which is to be considered by this Court is as to whether even a selected candidate has got a right to the post.

22. The issue stands settled by the judgment of this Court in the case of Service Single No.1893 of 2011 in re: Sanjay Tripathi and another vs. District Judge, Hardoi, decided on 27.08.2019, wherein this Court after considering the judgment of Hon'ble Supreme Court in the case of **Shankarsan Dash (supra)** has held as under:-

*"8. Now the question which arises is as to whether a selected person has any indefeasible right for appointment? The issue is no longer res-integra taking into consideration the law laid down by Hon'ble Apex Court in the case of* ***Sankarsan Dash (supra)*** *wherein the Constitution Bench of the Apex Court has held as under:-*

*"7. It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in the decisions in State of Haryana vs. Subhash Chander Marwaha (1973)IILLJ266SC, Neelima Shangla vs. State of Haryana [1986]3SCR785 or Jatendra Kumar vs. State of Punjab AIR1984SC1850 ."*

*9. Likewise, the Apex Court in the case of* ***Shubhas Chandra (supra)*** *has held as under:-*

*10. One fails to see how the existence of vacancies gives a legal right to a candidate to be selected for appointment. The examination is for the purpose of showing that a particular candidate is eligible for consideration. The selection for appointment comes later. It is open then to the Government to decide how many*

*appointments shall be made. The mere fact that a candidate's name appears in the list will not entitle him to a mandamus that he be appointed. Indeed, if the State Government while making the selection for appointment had departed from the ranking given in the list, there would have been a legitimate grievance on the ground that the State Government had departed from the rules in this respect. The true effect of Rule 10 in Part C is that if and when the State Government propose to make appointments of Subordinate Judges the State Government (i) shall not make such appointments by travelling outside the list and (ii) shall make the selection for appointments strictly in the order the candidates have been placed in the list published in the Government Gazette. In the present case neither of these two requirements is infringed by the Government. They have appointed the first seven persons in the list as Subordinate Judges. Apart from these constraints on the power to make the appointments, Rule 10 does not impose any other constraint. There is no constraint that the Government shall make an appointment of a Subordinate Judge either because there are vacancies or because a list of candidates has been prepared and is in existence.*

*10. The Hon'ble Supreme Court in the case of* ***All India SC and ST Association (supra)*** *has held as under:-*

*"10. Merely because the names of the candidates were included in the panel indicating their provisional selection, they did not acquire any indefeasible right for appointment even against the existing vacancies and the State is under no legal duty to fill up all or any of the vacancies as laid down by the Constitution Bench of this Court, after referring to earlier cases in Shankarsan Dash Vs. Union of India.*

*Para 7 of the said judgment reads thus :-*

*"It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in the decisions in State of Haryana vs. Subhash Chander Marwaha (1973)IILLJ266SC, Neelima Shangla vs. State of Haryana [1986]3SCR785 or Jatendra Kumar vs. State of Punjab AIR1984SC1850 ."*

*11. Likewise, the Hon'ble Supreme Court in the case of Akhilesh V. (supra) has held as under:-*

*"4. The short question arising for consideration in these appeals is whether mere empanelment can justify a mandamus to make appointments because vacancies may exist. Additionally, whether mandamus can be issued to make appointments from the panel on vacancies which may have arisen subsequently due to superannuation etc. during the life of the rank list. The*

*question assumes significance in view of the stand of the Appellant that it did not wish to make any further appointments due to a financial crunch and a skewed bus to passenger ratio, and for which purpose it had also appointed a committee to recommend remedial measures.*

*5. We have heard the counsel for the parties and opine that the order of the High Court is unsustainable. The cadre strength has rightly been held not to be a relevant consideration. The High Court has erred in issuance of mandamus to fill up a total of 97 vacancies, including those arising subsequently but during the life of the rank list. Vacancies which may have arisen subsequently could not be clubbed with the earlier requisition and necessarily had to be part of another selection process. The law stands settled that mere existence of vacancies or empanelment does not create any indefeasible right to appointment. The employer also has the discretion not to fill up all requisitioned vacancies, but which has to be for valid and germane reasons not afflicted by arbitrariness. The Appellant contends a financial crunch along with a skewed staff/bus ratio which are definitely valid and genuine grounds for not making further appointments. The court cannot substitute its views over that of the Appellant, much less issue a mandamus imposing obligations on the Appellant corporation which it is unable to meet.*

*6. Suffice to observe from Kulwinder Pal Singh v. State of Punjab, (2016) 6 SCC 532:*

*12. In Manoj Manu v. Union of India, (2013) 12 SCC 171, it was held that (para 10) merely because the name of a candidate finds place in the select list, it would not give the candidate an indefeasible right to get an appointment as well. It is always open to the Government not to fill up the vacancies, however such decision should not be arbitrary or unreasonable. Once the decision is found to be based on some valid reason, the Court would not issue any mandamus to the Government to fill up the vacancies...."*

*12. Thus, taking into consideration the aforesaid dictum of law as laid down by Hon'ble Apex Court, it is apparent that selected persons have no indefeasible right of appointment."*

23. Today itself i.e. on 07.11.2024, a Constitution Bench of Hon'ble Supreme Court in the case of **Tej Prakash Pathak and others vs. Rajasthan High Court and others – 2024 INSC 847** has concluded in paragraph 42(6) of the judgment as under:-

*"(6) Placement in the select list gives no indefeasible right to appointment. The State or its instrumentality for bona fide reasons may choose not to fill up the vacancies. However, if vacancies exist, the State or its instrumentality cannot arbitrarily deny appointment to a person within the zone of consideration in the select list."*

24. Thus, from a perusal of the judgment of this Court in the case of **Sanjay Tripathi (supra)** as well as Constitution Bench of the Supreme Court in the case of **Tej Prakash Pathak (supra),** it clearly emerges that even a selected candidate has got no right to the post and that the State or its instrumentality for bona fide reasons may choose not to fill up the vacancies.

25. The instant case so far as it pertains to the petitioner stands on weaker footing inasmuch as the petitioner was never declared as a selected candidate rather the candidature of the candidate

namely Sri Chaturvedi had itself been cancelled prior to issue of select list by the respondents. Thereafter, the respondents have issued a fresh advertisement no.3 of 2024.

26. Once even a selected candidate has got no indefeasible right for appointment and the petitioner was never declared as selected and a fresh advertisement has been issued consequently this Court does not have any occasion to direct the respondents to make selection from the earlier advertisement more particularly when a fresh advertisement has already been issued by the respondents.

27. So far as challenge raised to the advertisement no.3 of 2024 is concerned whereby as per the petitioner the qualification has been changed for the post in question even without seeking the approval from the UGC and the said qualification being not a qualification prescribed by the UGC, suffice to state that the last date fixed for receipt of applications in terms of the said advertisement was 06.04.2024. In case the petitioner was aggrieved by the said advertisement he should have challenged it within the last date fixed for receipt of the applications but he chose not to do so and only in the month of August 2024 that he has chosen to challenge the said advertisement by means of instant petition. For this act, the petitioner has to thank himself and the Court is not expected to come to the rescue of a litigant who chooses not to challenge the advertisement timely rather challenges it only at the time when the said selection has proceeded to a substantial stage.

28. Keeping in view the aforesaid discussion, no case for interference is made out. Accordingly, the writ petition is dismissed.

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**(2024) 11 ILRA 175**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 20.11.2024**

**BEFORE**

**THE HON'BLE ABDUL MOIN, J.**

Writ-A No. 10894 of 2024

**Gram Panchayat Pratappur Chamurkha ...Petitioner**

**Versus**

**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Mohan Singh

**Counsel for the Respondents:**
C.S.C.

**A. Service Law-Constitution of India,1950-Article 226-The petitioner, Gram Panchyat, Chamurkha filed a writ petition challenging the adjustment order dated 6.07.2024, appointing respondent no.6 as Rojgar Sewak in the Gram Panchayat, and the rejection of their representation dated 21.10.2024-The Allahabad High Court, Lucknow Bench, dismissed the petition on the grounds of lack of locus standi-The court held that the petitioner failed to establish any legal injury or right affected by the impugned orders-The petitioner raised various grounds, including non-residency of the appointee, lack of disciplinary authority, absence of rules for adjustment and alleged expiration of appointment tenure-However, these grounds were found to be legally unsustainable-Furthermore, the petitioner's reliance on the decision in Smt. Geeta Devi case was deemed inapplicable to the facts of this case-The court reiterated that only a person aggrieved by a legal injury can challenge**

**an act, and mere sentimental or fanciful grievances are insufficient.(Para 1 to 20)**

**The writ petition is dismissed.** (E-6)

**List of Cases cited:**

1. Smt. Geeta Devi Vs Uma Shanker Yadav & ors., SPLAD No. 681 of 2010

2. Ravi Yashwant Bhoir Vs Collector (2012) 4 SCC 407

3. R Vs London Country Keepers of the Peace of Justice(1890) 25 QBD 357

4. Dharam Raj Vs St. of U.P. & ors. (2010) 2 AWC 1878 All

(Delivered by Hon'ble Abdul Moin, J.)

1. Heard Sri Mohan Singh, learned counsel for the petitioner, and Dr. Udai Veer Singh, learned Additional Chief Standing Counsel appearing for the State-respondents.

2. Instant petition has been filed by the Gram Panchayat raising a challenge to the order dated 21.10.2024 passed by respondent no.3, a copy of which is Annexure-1 to the petition, whereby the representation preferred by the petitioner has been rejected. Also under challenge is that the order dated 06.07.2024, a copy of which is Annexure-2 to the petition, whereby respondent no.6 has been adjusted on the post of Rojgar Sewak in Gram Panchayat Pratappur Chamurkha.

3. A pointed query has been put to the learned counsel for the petitioner as to the locus of the village panchayat to challenge the adjustment order of respondent no.6.

4. Sri Mohan Singh, learned counsel for the petitioner, has been unable to explain the locus of the Gram Panchayat in challenging the order of adjustment of respondent no.6 rather has urged various grounds on which the adjustment order is bad although has placed reliance on the Division Bench judgment of this Court passed in **Special Appeal Defective No.681 of 2010 in re: Smt. Geeta Devi vs. Uma Shanker Yadav and others** decided on 28.07.2010. As Sri Singh has vehemently argued on various grounds as such the Court proceeds to deal with the said grounds subsequent to considering the locus of the petitioner to file the petition.

5. As already indicated above, the Gram Panchayat has filed the instant petition being aggrieved by the adjustment order of respondent no.6 in the petitioner's Gram Panchayat as Rojgar Sewak. As such, at the outset, the locus of the petitioner has to be seen.

6. The question of locus has been considered by Hon'ble Supreme Court in the case of **Ravi Yashwant Bhoir Vs Collector** reported in **(2012) 4 SCC 407**, wherein the Hon'ble Supreme Court has held as under:-

*"...A legal right is an averment of entitlement arising out of law. In fact, it is a benefit conferred upon a person by the rule of law.* ***Thus, a person who suffers from legal injury can only challenge the act or omission. There may be some harm or loss that may not be wrongful in the eyes of law because it may not result in injury to a legal right or legally protected interest of the complainant but juridically harm of this description is called damnum sine injuria ....*** *A fanciful or sentimental grievance may not be sufficient to confer a locus stand to sue upon the individual. There must be injuria or a legal grievance*

*which can be appreciated and not a stat pro rationed valuntas reasons."*

(emphasis by the Court)

7. In the case of **R. v. London Country Keepers of the Peace of Justice, (1890) 25 QBD 357**, the Court has held as under:

*"A person who cannot succeed in getting a conviction against another may be annoyed by the said findings. He may also feel that what he thought to be a breach of law was wrongly held to be not a breach of law by the Magistrate.*

***He thus may be said to be a person annoyed but not a person aggrieved, entitle to prefer an appeal against such order."***

(emphasis by the Court)

8. A Division Bench of this Court in the case of **Dharam Raj vs. State of U.P. and others-(2010) 2 AWC 1878 (All)** has held as under:-

***"12. According to our opinion a "person aggrieved" means a person who is wrongly deprived of his entitlement which he is legally entitled to receive and it does not include any kind of disappointment or personal inconvenience. "Person aggrieved" means a person who is injured or he is adversely affected in a legal sense.***

***13. It is settled law that a person who suffers from legal injury only can challenge the act/action/order etc. by filing a writ petition."***

9. From perusal of the judgment of Hon'ble Supreme Court in the case of **Ravi Yashwant Bhoir (supra)** it clearly emerges that it is only a person who suffers from legal injury who can challenge the said act or omission. There may be some harm or loss that may not be wrongful in the eyes of law because it may not result in injury to a legal right or legally protected interest. A fanciful or sentimental grievance may not be sufficient to confer a locus to sue upon the individual.

10. Likewise, from the judgment of this Court in the case of **Dharam Raj (supra),** it also emerges that a person who suffers from legal injury only can challenge the act/action/order by filing a writ petition and that a person aggrieved would mean a person who is wrongly deprived of his entitlement which he is legally entitled to receive.

11. After summarizing the principles on the point of locus of a person to challenge the order, the Court now proceeds to consider the grounds as raised by the petitioner in order to challenge the orders impugned.

12. The argument of learned counsel for the petitioner is that the orders impugned are bad in the eyes of law as (a) the Rojgar Sewak who is to be appointed should be a resident of the same village, (b) as the Gram Panchayat is not the appointing authority of respondent no.6 consequently the Gram Panchayat would be precluded from initiating any disciplinary proceedings against her in case she commits any misconduct, (c) there is no provision for adjustment of a Rojgar Sewak in some other village, and (d) as the respondent no.6 had been appointed on 16.05.2008 and she could only have been appointed for a period of three years and as such she could not have been validly adjusted beyond a period of three years in the Gram Panchayat of the village of the petitioner.

13. As regards ground (a) that the Rojgar Sewak to be appointed should be of the same village, the said ground is patently misconceived considering the fact that the respondent no.6 has not been **appointed** in the Gram Panchayat rather she has been posted on an adjustment. Thus, the said ground is rejected.

14. As regards ground (b) that in case any irregularly is committed by respondent no.6, the petitioner Gram Panchayat would be unable to take any action as it is not the appointing authority, the said ground also merits to be rejected out rightly inasmuch as once the respondent no.6 has been appointed by some other Gram Panchayat and has been adjusted in the Gram Panchayat of the petitioner, it would always be open for the petitioner Gram Panchayat to inform the Gram Panchayat by which the respondent no.6 may have been appointed to initiate proceedings against her or to act against her.

15. So far as the ground (c) that there are no rules or any circular for adjustment of a Rojgar Sewak, learned counsel for the petitioner has also been unable to indicate that there is any bar that a Rojgar Sewak who has been appointed cannot be adjusted in any village. The said ground is also rejected.

16. So far as ground (d) is concerned, the said ground is also found to be patently misconceived considering that the petitioner himself admits that the respondent no.6 had been appointed way back in the year 2008 and has been continuing since last 16 years. The petitioner has not brought on record the appointment order or even the extension order of respondent no.6 to indicate that she could not have continued beyond three years or for that matter her last extension was made prior to a period of three years. Thus, in the absence of any document to indicate to the contrary, the said ground is also rejected.

17. Thus, from a perusal of the aforesaid discussion it is apparent that none of the grounds as have been raised by the petitioner are legally sustainable in the eyes of law.

18. Once from perusal of the aforesaid grounds as raised by the petitioner it does not emerge that the petitioner has got any legal right or entitlement arising out of law and no legal injury has been sustained by him after passing of the aforesaid orders impugned, consequently the petitioner has no locus to challenge the orders impugned.

19. As regards the judgment of this Court in the case of **Smt. Geeta Devi (supra),** suffice to state that the said judgment has not dealt with the locus of the Gram Panchayat to challenge the order of adjustment of Gram Rojgar Sewak. Thus, the said judgment would have no applicability in the facts of the instant case.

20. Keeping in view the aforesaid discussion the writ petition is dismissed.

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**(2024) 11 ILRA 178**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 08.11.2024**

**BEFORE**

**THE HON'BLE SAURABH SHYAM SHAMSHERY, J.**

Writ- B No. 504 of 2023

**Mahendra Singh ...Petitioner**
**Versus**
**Board of Revenue U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Ashish Kumar Srivastava, V. K. Ojha

**Counsel for the Respondents:**
C.S.C.,Azad Rai, Dhiraj Singh, Ragvendra Singh Rathour, Rahul Sahai, Siya Ram Sahu

**Civil Law – U.P. Revenue Code, 2006 - Sections 38(1) &. 144 – Code of Civil Procedure, 1908 - Order VII - Rule 11 - Rule 13 – Rejection of Plaint under Order VII Rule 11 – Concealment of Prior Proceedings under Section 38(1) in Suit under Section 144 of U.P. Revenue Code – Effect – In a suit under Section 144 of the U.P. Revenue Code, the plaintiff claimed rights over land based on oral baynama and adverse possession but suppressed the outcome of earlier proceedings under Section 38(1), wherein his claim based on a sale deed was rejected. Defendant filed an application under Order VII Rule 11 CPC for rejection of the plaint due to concealment of material facts. *Held*: Plaintiff was under a legal obligation to disclose the earlier proceedings. However, under Order VII Rule 13 CPC, the plaintiff has liberty to file a fresh suit on the same cause of action. (Paras 12, 14)**

**Dismissed.** (E-5)

**List of Cases cited:**

1. Kum. Geetha, D/o Late Krishna & ors. Vs. Nanjundaswamy & ors. (2023) INSC 964

2. Eldeco Housing & Industries Ltd. Vs. Ashok Vidyarthi & ors. (2023) INSC 1043

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

1. Heard Mr. V.K. Ojha, Advocate, holding brief of Sri Ashish Kumar Srivastava, learned counsel for the petitioner and Mr. Rahul Sahai, learned counsel for respondent nos.4 and 5.

2. In the present case, father of the contesting respondent nos.4 and 5 has filed a suit under Section 38(1) of the Uttar Pradesh Revenue Code, 2006 (in short 'the Code') for correction of errors in the records of rights i.e. Khatauni. The said suit was contested by the present petitioner and the same was allowed by a reasoned order dated 28.5.2016 and entries made in the name of present petitioner was expunged and name of the contesting respondents were directed to be entered.

3. It is not in much dispute that there was no challenge to said order at the instant of the petitioner. Accordingly, it has attained finality and claim of the present petitioner on basis of a sale-deed in regard to the land in dispute was rejected so far as correction of record was concerned.

4. The petitioner concealing details of above referred proceedings as well as its out come has subsequently filed a suit under Section 144 of the Code on 3.11.2016 and claimed land in dispute on basis of a possession on oral baynama as well as on plea of adverse possession.

5. It appears that a purported application under Order VII Rule 11 C.P.C. was filed by the defendants/contesting respondents for rejection of the plaint on a ground that petitioner/plaintiff has not come up before the Court with clean hands and concealed a material fact i.e. outcome of the earlier proceedings that his claim on basis of alleged sale-deed was rejected in a proceedings arising out of Section 38(1) of the Code, which has attained finality and has bearing on suit also.

6. The learned Trial Court by an order dated 27.5.2017 rejected the suit as not

maintainable. The relevant part thereof is mentioned hereinafter:

"संदर्भित वाद में पोषणीयता के बिन्दु पर उभयपक्षों के विद्वान अधिवक्ता द्वारा प्रस्तुत तर्को को सुना गया तथा वादी पक्ष को पोषणीयता पर लिखित बहस भी प्रस्तुत करने हेतु अवसर प्रदान किया गया। प्रतिवादीगण संख्या 1 व 2 के विद्वान अधिवक्ता की ओर से अपनी लिखित बहस प्रस्तुत की गयी है, जो संलग्न पत्रावली है, किन्तु पर्याप्त अवसर दिये जाने के बावजूद वादी के विद्वान अधिवक्ता की ओर से कोई भी लिखित बहस प्रस्तुत नहीं हुई है।

मैंने पत्रावली पर उपलब्ध समस्त अभिलेखों का सम्यक परिशीलन किया तथा लिखित बहस का अध्ययन किया। पत्रावली पर उपलब्ध अभिलेखीय साक्ष्यों के परिशीलन से स्पष्ट होता है कि वादग्रस्त भूखण्ड के बावत पक्षों के मध्य न्यायालय तहसीलदार करछना, न्यायालय अपर आयुक्त (द्वितीय) इलाहाबाद मण्डल, इलाहाबाद एवं न्यायालय उपजिलाधिकारी करछना में वाद संस्थित होकर निर्णीत हो चुका है, किन्तु वादी द्वारा तथ्यों को छिपाकर नये सिरे से प्रश्नगत घोषणात्मक वाद योजित किया गया है, जो विधिसम्मत न होने के कारण पोषणीय नहीं है एवं निरस्त किये जाने योग्य है।"

7. The aforesaid order was challenged by the petitioner by way of filing a revision petition before the Board of Revenue. However, the same was rejected by an order dated 6.6.2022. The relevant part thereof is mentioned hereinafter:

"मैनें उभयपक्ष के विद्वान अधिवक्ताओं द्वारा प्रस्तुत तर्कों एवं साक्ष्यों को विस्तारपूर्वक सुना एवं पत्रावली पर उपलब्य आलोच्य आदेशों एवं अधीनस्थ न्यायालय के अभिलेखों का भली भांति परिशीलन किया।

उपरोक्त वर्णित तथ्यों से स्पष्ट है कि प्रश्नगत प्रकरण तहसीलदार करछना द्वारा पारित आदेश दिनांक 08.07.2014 से प्रारम्भ हुआ। जिसके विरुद्ध निगरानीकर्ता ने अपर आयुक्त द्वितीय इलाहाबाद मण्डल इलाहाबाद के न्यायालय में निगरानी प्रस्तुत की जिसका निस्तारण कर अपर आयुक्त ने अपने आदेश दिनांक 30.11.2015 के द्वारा आदेश दिनांक 08.07.2014 को निरस्त कर वाद परीक्षण न्यायालय को गुणदोष के आधार निस्तारित किये जाने हेतु प्रत्यावर्तित कर दिया जिसके क्रम में उपजिलाधिकारी ने वाद संस्थित कर अंतिम आदेश दिनांक 28.05.2016 पारित किया जिसके द्वारा निगरानीकर्ता को दावा निरस्त कर दिया गया। निगरानीकर्ता को उपजिलाधिकारी करछना द्वारा पारित आदेश दिनांक 28.05.2016 के विरुद्ध आयुक्त /अपर आयुक्त अथवा राजस्व परिषद न्यायालय में वाद योजित किये जाने की स्वतन्त्रता प्राप्त थी परन्तु निगरानीकर्ता ने उपरोक्त तथ्यों को

छिपाकर उपजिलाधिकारी करछना के ही न्यायालय में धारा 144 उ०प्र० राजस्व संहिता 2006 के अन्तर्गत दिनांक 05.11.2016 को एक नवीन वाद योजित किया। जिसे पोषणीय न पाते हुए उपजिलाधिकारी करछना ने अपने आदेश दिनांक 27.05.2017 के द्वारा निरस्त कर कोई त्रुटि नहीं की है। अतः उपजिलाधिकारी करछना द्वारा पारित आदेश दिनांक 27.05.2017 में किसी प्रकार का हस्तक्षेप किया जाना न्यायोचित प्रतीत नहीं होता है। अतएव प्रस्तुत निगरानी बलहीन एवं सारहीन होने के कारण निरस्त किये जाने योग्य है।

अतः प्रस्तुत निगरानी बलहीन एंव सारहीन होने के कारण निरस्त की जाती है। निगरानी के लम्बनकाल में पारित स्थगन आदेश दिनांक 06.07.2017 निरस्त किया जाता है। अधीनस्थ न्यायालय के अभिलेख वापस भेजे जायें। वाद आवश्यक कार्यवाही पत्रावली दाखिल दफतर हो।"

8. Mr. V.K. Ojha appearing on behalf of the petitioner has submitted that the learned Trial Court as well as the Revisional Court has not considered that the issue of maintainability could be considered only after framing of preliminary issue. However, without framing of any issue the suit was rejected, and as such the relevant provisions of C.P.C. i.e. Order XIV Rule 1 (1 to 6) were not complied with. Learned counsel also submitted that since nature of the proceedings under Section 38(1) of the Code does not create any right, therefore, its disclosure was not mandatory.

9. *Per contra*, Mr. Rahul Sahai appearing on behalf of the contesting respondents has submitted that the petitioner has not denied that details of earlier proceedings concluded under Section 38(1) of the Revenue Code, 2006 were not disclosed in the plaint and since its finding may have relevance, therefore, both the Courts have rightly held that the suit was not maintainable.

10. I have heard learned counsel for the parties and perused the records.

11. Before adverting to the rival submissions, few paragraphs of the judgments passed by the Supreme Court in the case of ***Kum. Geetha, D/o Late Krishna & Ors. Vs. Nanjundaswamy & Ors. (2023) INSC 964,*** and ***Eldeco Housing and Industries Limited Vs. Ashok Vidyarthi and others (2023) INSC 1043*** being relevant on issue of consideration of an application filed under Order VII Rule 11 C.P.C., are respectively reproduced hereinafter:

***Kum. Geetha (supra)***

*"23.10. At this stage, the pleas taken by the defendant in the written statement and application for rejection of the plaint on the merits, would be irrelevant, and cannot be adverted to, or taken into consideration. Sopan Sukhdeo Sable v. Charity Commr., (2004) 3 SCC 137)"*

***Eldeco Housing (supra)***

*"26. However, the fact remains that all the aforesaid documents, referred to by the respondent in support of his plea for rejection of the plaint, cannot be considered at this stage as these are not part of the record with*

*the Court filed along with the plaint. This is the stand taken by the respondent-defendant in the application filed under Order VII Rule 11 C.P.C. As noticed above,* ***no amount of evidence or merits of the controversy can be examined at the stage of decision of the application under Order VII Rule 11 C.P.C.*** *Hence, in our view, the impugned order of the High Court passed in the Review Application deserves to be set aside. Ordered accordingly."*

12. It is well settled that the proceedings arising out of Section 38(1) of the Revenue Code are summary in nature and its finding may not be final adjudication on the issue. Still, since the suit was filed on basis of a oral sale-deed and alleged possession thereon as well as on plea of adverse possession, therefore, any finding in regard to the sale-deed must be part of the suit as well as the petitioner ought to have came before any Court with clean hands, therefore, he was under legal obligation to disclose the earlier proceedings, but admittedly he has not done so, therefore, he has not come with clean hands before the Court, which is a adverse factor.

13. So far as other argument is concerned, that to consider the application under Order VII Rule 11 C.P.C., issues are required to prove has no merit and for that a reference is taken from the above referred judgments that at the stage of consideration of application under Order VII Rule 11 C.P.C., merit of the case is not required to be considered, since it is an application for rejection of the plaint.

14. In the aforesaid circumstances, the Court is of considered opinion that there is no illegality in the impugned orders dated 6.6.2022 and 27.5.2017. However, under Order VII Rule 13 C.P.C., the petitioner has still liberty to present a fresh plaint in respect of the same cause of action. Therefore, while rejecting the prayers of this writ petition, it is observed that the petitioner can take benefit of Order VII Rule 13 C.P.C., if so advised. However, he has to disclose all the facts including the earlier proceedings also.

15. In pursuance to the previous order passed by this Court, concerned S.D.M. and the S.H.O. were present in Court and they have tendered unqualified apology that they have acted in haste without considering that the present writ petition was pending before this Court. However, they assure that such acts will not be repeated in future.

16. The District Magistrate, Prayagraj as well as the Commissioner of Police, Prayagraj are directed to communicate their officers that if the manner of doing a particular act is prescribed under a provision of law, the act must be done in that manner or not at all.

17. Present writ petition is, accordingly, **disposed off.** Legal consequence shall follow.

18. Registrar (Compliance) to take steps.

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**(2024) 11 ILRA 182**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 19.11.2024**

**BEFORE**

**THE HON'BLE SAURABH SHYAM SHAMSHERY, J.**

Writ- B No. 1633 of 2023
With
FAFO No. 793 of 2024

**State of U.P. & Anr. ...Petitioners**
**Versus**
**Board of Revenue & Ors. ...Respondents**

**Counsel for the Petitioners:**
Ratan Deep Mishra

**Counsel for the Respondents:**
Aakash Rai, Neeraj Kumar Pandey, Syed Mohd. Fazal, Vijay Kumar Rai

**(A) Civil Law - Land Law & Tenancy Law - Orders related to tenancy rights over disputed land under challenge - Title Dispute - Interim Injunction – Order 39 Rule 1 and 2 CPC (application 6-C) - Maintainability - U.P. Land Revenue Act, 1901 - Section 33/39 , U.P. Tenancy Act, 1939 – Section 242 - Suits and applications cognizable by Revenue Courts only - Relevant provisions concerning eviction procedures, Government Grants Act, 1895 – Rules related to lease agreements - Revenue records are not documents of title - Mutation in revenue records neither create nor extinguishes title, nor does it have presumptive value on title - If the matter involves complicated question of law and fact relating to title, the Court will relegate the parties to a remedy by way of a comprehensive declaration of title, instead of deciding the issue in a suit for mere injunction. (Para -25,27,28)**

Appellants/contesting respondents claimed title to a disputed land based on revenue entries - as Class 10-A (non-occupancy tenants) - but State/Irrigation Department produced documents showing that - land was granted to the predecessors of the appellants on lease under the Government Grants Act - whether interim injunction can be granted in a case of disputed title. (Para - 4, 25,26)

**HELD: -** Appellants/contesting respondents never filed any suit under U.P. Tenancy Act to crystalize their rights. Title highly disputed. Relief sought for interim injunction rightly rejected by trial Court. No illegality in impugned order, hence, FAFO stands dismissed. Matter (Petition) remitted back to Board of Revenue for fresh decision after affording opportunity to both parties. (Para -30)

**FAFO stands dismissed.**

**Writ Petition partly allowed.** (E-7)

**List of Cases cited:**

1. Lallu Yeshwant Singh (Dead) by his LRs Vs Rao Jagdish Singh & ors., AIR 1968 SC 620

2. St. of U.P. & ors.Vs Maharaja Dharmender Prasad Singh, AIR 1989 SC 997

3. Anathula Sudhakar Vs P. Buchi Reddy (D) by LRs. & ors., (2008) 4 SCC 594

4. Pratap Singh (D) through LRs & ors. Vs Shiv Ram (D) through LRs., (2020) 11 SCC 242

5. Ravindra Singh & ors. Vs St. of U.P. & ors., 2022:AHC:117007

6. Muhammad Khalilur Rahman Khan Vs Mohammad Muzammilullah Khan, AIR 1933 ALL 468

7. Durga Prasad Vs Board of Revenue, Allahabad AIR 1970 ALL 159

8. Basdeo & ors. Vs Board of Revenue, Allahabad, AIR 1974 ALL 337

9. Paras Nath Vs Board of Revenue, Allahabad, AIR 1986 ALL 111

10. Kashi Math Sansthan & anr. Vs Shrimad Sudhindra Thirta Swamy & anr., (2010) 1 SCC 689

11. Tehsildar, Urban Improvement Trust & anr. Vs Ganga Bai Menariya (D) through LRs & ors., Civil Appeal No. 722 of 2012

12. St. of U.P. Vs Ram Prasad Saxena, First Appeal No. 566 of 1996

13. Kayalulla Parambath Moidu Haji Vs Namboodiyil Vinodan, Civil Appeal No. 5575-76 of 2021

14. TV Ramakrishna Reddy Vs M. Mallappa & anr., (2021) 13 SCC 135

15. P. Kishore Kumar Vs Vittal K.Patkar, 2023 SCC Online SC 1483

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

1. Heard S/Sri Sudhanshu Srivastava and R.K. Tiwari, learned A.C.S.C. along with Sri Anshul Nigam, learned Standing Counsel for State-petitioners and S/Sri S.G. Hasnain and H.R. Mishra, learned Senior Advocates assisted by S/Sri Syed. Mohd. Fazal, Abhishek Tandon, Dhiraj Pandey, learned advocates for respondents in writ petition and S/Sri S.G. Hasnain and H.R. Mishra, learned Senior Advocates assisted by S/Sri Syed. Mohd. Fazal, Abhishek Tandon, Dhiraj Pandey, learned advocates for appellants and S/Sri Sudhanshu Srivastava and R.K. Tiwari, learned A.C.S.C. along with Sri Anshul Nigam, learned Standing Counsel for State-respondents in First Appeal From Order.

2. Above referred two cases are arising out of same land in dispute, therefore, with consent of learned advocates for rival parties, both cases are being decided by a common judgment.

3. State of U.P. has preferred Writ Petition No. 1633/2023 wherein an order dated 01.05.2018 passed in Revision No. 1640/2017 by Board of Revenue, U.P., Lucknow filed by three appellants/contesting respondents (out of them 2 have filed the connected FAFO No. 793/2024) is challenged. The details of land in dispute is described in both cases i.e. Khasra no. 385/1 and Khasra no. 319 situated in village Kaila, Pargana Loni, Tehsil and District- Ghaziabad.

4. Appellants in FAFO (contesting respondents in writ petition) have claimed right over land in dispute on basis of their alleged very long possession and have entered into revenue records as non-occupancy tenants in Class 10-A whereas State has highly disputed their claim on the ground that land in dispute was allotted to their predecessors by way of a lease under Government Grants Act on 01.06.1954 which purportedly continued up to 30.09.1997 and thereafter State Government took a decision not to renew any lease.

5. Proceedings in writ petition were arisen in the year 2006 when on a complaint, the Sub Divisional Magistrate initiated the proceedings in Case No. 21/2005-06 under Section 33/39 of U.P. Land Revenue Act, 1901 (for short "Act of 1901") and vide order dated 10.03.2006, name of appellants/contesting respondents were striked out as recorded in Class 10-A and it was directed to record that "मिलकियत सरकार" i.e. property of Central Government. Relevant part thereof is quoted below -:

"निर्णय दिनांकः- 10/3/2006

प्रस्तुत वाद तहसीलदार, गाजियाबाद की आख्या दिनांक 06.03.2006 के आधार पर योजित हुआ । तहसीलदार, गाजियाबाद द्वारा क्षेत्रीय लेखपाल एवं भूलेख निरीक्षक की जांच आख्या को संस्तुति सहित प्रेषित किया है । जांच आख्या में कहा गया है कि ग्राम कैला परगना लोनी, तहसील व जिला गाजियाबाद के नॉन जेड.ए. फसली 1412 महाल के खेवट संख्या 96 सैन्ट्रल गर्वन्मेंट आदि की खाता संख्या 209 मो० उगर पुत्र अययूब अली निवासी ग्राम का नाम खसरा मम्बर 319 क्षेत्रफल 53-9-0. खसरा संख्या 385/1

रकबई 18-17-0 कुल दो नम्बरान फुल रकबई 72-6-0 पर श्रेणी-10-क के रूप में दर्ज है, जबकि उक्त भूमि पर सैन्ट्रल गर्वन्मेंट मिलिटरी ऑफ डिफेंस का कब्जा है। मो० उमर पुत्र अययूब अली खां का कब्जा नहीं है। कब्जा न होने की दशा में मौ० उमर पुत्र अययूब अली निवासी ग्राम का नाम श्रेणी-10-क से निरस्त किये जाने की संस्तुति की जाती है।

विद्वान नामिका वर्क ल-राजस्व को सुना गया एवं पत्रावली का अवलोकन किया गया । पत्रावली पर उपलब्ध तहसीलदार गाजियाबाद की जांच आख्या से स्पष्ट है कि ग्राम कैला, परगना लोनी, तहसील व जिला गाजियाबाद के नॉन जेड.ए. फसली 1412 महाल के खेवट संख्या 96 सैन्ट्रल गर्वन्मेट आदि की खाता संख्या 209 मो० उमर पुत्र अययूब अली निवासी ग्राम का नाम खसरा नम्बर 319 क्षेत्रफल 53-9-0, खसरा संख्या 385/1 रकबई 18-17-0 कुल दो नम्बरान कुल रकबई 72-6-0 पर श्रेणी-10-क के रूप में दर्ज है, जबकि उक्त भूमि पर सैन्ट्रल गर्वन्मेंट मिलिटरी ऑफ डिफेंस का कब्जा है। इस प्रकार प्रतिवादी का उपरोक्त भूमि पर नाम गलत रूप से चला आ रहा है। ए.आई.आर. 1991 मा. उच्चतम न्यायालय पृष्ठ संख्या 909 यू.पी. जूनियर डाक्टर्स एक्शन कमेटी बनाम डा. बी.शीतल नन्दवानी एवं अन्य में पारित आदेश दिनांक 31.08.90 एवं निर्देश संख्या 176 वर्ष 1985-86 (एल. आर.) सुल्तानपुर रमाशंकर बनाम सरकार निर्णय दिनाक 06.09.1991 के दृष्टान्तों से स्पष्ट है कि फर्जी आदेशों के द्वारा किसी भी व्यक्ति ने कोई लाभ प्राप्त किया है, तो उसके द्वारा प्राप्त किये गये लाभ को निरस्त करने से पूर्व उस व्यक्ति को सुनवाई का अवसर देना आवश्यक नहीं है। चूंकि उपरोक्त भूमि पर मौ० उमर पुत्र अय्यूब निवासी ग्राम का कोई कब्जा नहीं है, बल्कि सैन्ट्रल गर्वन्मेंट मिलटरी आफ डिफेंट काकब्जा है, अतः मौ० उमर पुत्र अययूब का नाम निरस्त करने से पूर्व उपरोक्त दृष्टान्तों से सहमत होते हुए सम्बन्धित पक्षकार को सुनवाई का अवसर देना आवश्यक नहीं समझता हूँ। अतः उपरोक्त आधार पर ग्राम कैला, परगना लोनी, तहसील व जिला गाजियाबाद के नान जेड़.ए. फसली 1412 के खेवट संख्या 96 सैन्ट्रल गर्वन्मेंट आदि की खाता संख्या 209 मो० उमर पुत्र अययूब अली निवासी ग्राम का नाम खसरा नम्बर 319 क्षेत्रफल 53-9-0, खसरा संख्या 385/1 रकबई 18-17-0 कुल दो नम्बरान कुल रकबाई 72-6-0 पर श्रेणी -10-क का नाम निरस्त कर मिल्कियत सरकार दर्ज किया जाना उचित प्रतीत होता है।

## आदेश

उपरोक्त विवेचना के आधार पर ग्राम कैला, परगना लोनी, तहसील व जिला गाजियाबाद के नान जेड.ए. फसली 1412 महाल के खेवट संख्या 96 सैन्ट्रल गर्वन्मेंट आदि की खाता संख्या 209 मो० उमर पुत्र

अययूब अली निवासी ग्राम का नाम खसरा नम्बर 319 क्षेत्रफल 53-9-0, खसरा संख्या 385/1 रकबई 18-17-0 कुल दो नम्बरान कुल रकबई 72-6-0 पर श्रेणी -10-क का नाम निरस्त कर मिल्कियत सरकार दर्ज हो। आदेश की प्रतिलिपि तहसीलदार, गाजियाबाद को इस आशय से भेजी जाये कि वह उपरोक्त आदेशों का राजस्व अभिलेखों में अमलदरामद करते हुए अनुपालन आख्या से एक सप्ताह के अन्दर अवगत कराया जाना सुनिश्चित करें। पत्रावली वाद आवश्यक कार्यवाही दाखिल दफ्तर हो। ”

6. In aforesaid circumstances, Department of Headworks (Irrigation Department) filed an application in above referred case on 24.08.2007 that order dated 10.03.2006 be set aside and the case be restored for consideration of their stand and instead of land being of Central Government, name of State/Department be entered since appellants/contesting respondents have objected the construction work commenced by said Department.

7. Meanwhile, father of one of appellants/contesting respondents challenged the order dated 10.03.2006 passed by the S.D.M. on 12.08.2010 by way of a revision before Additional Commissioner, Meerut which was allowed vide order dated 12.08.2010 and matter was remitted back to S.D.M., Ghaziabad to decide it fresh. In pursuance of above order, application so filed by Irrigation Department was also heard. The S.D.M., Ghaziabad vide order dated 22.08.2016 not only rejected the impleadment application of Smt. Qamar Sultana but disposed of the case whereby land in dispute was again directed to be recorderd as “मिलकियत सरकार”. So far as application of Irrigation Department was concerned, it was rejected since no document in support of their claim was filed. Relevant part thereof is quoted below :-

“पत्रावली पर उपलब्ध अधिशासी अभियन्ता हैड वर्क्स आगरा नहर औखला नई दिल्ली की ओर से भी पुनः स्थापना प्रार्थना पत्र दिनांक 10.03.2006 के विरूद्ध दिनांक 24.03.2006 को प्रेषित किया गया था। जिसमें कथन किया गया था। कि विभाग नहर नदी व सिचाई सम्बन्धित खण्ड की भूमि का मालिक है उसकी देख रेख व नहर आदि की मेन्टीनेंस रख रखाव का अधिकार है। खेवट 96 जो सेन्ट्रल गर्वमेन्ट के नाम दर्ज उसके खाता संख्या 209 के खसरा नम्बर 385/1 जो हिण्डन नदी का नम्बर तथा खसरा 319 जो डिण्डन नदी वैराज से लगा है जिसमें विभाग के हिण्डन नदी बैराज की देख रेख व मरम्मत का सामान पत्थर आदि व मिट्टी उठाने के लिए विभाग के नाम सरकार द्वारा सिंचाई विभाग के लिए गजट नम्बर 11971 दिनांक 19 मई 1873 द्वारा छोड़ा गया था। जिसके कारण विभाग खसरा नम्बर 385/1 व 319 का वर्ष 1873 से मालिक काबिज चला आ रहा है। विभाग सन् 1999 तक समय समय पर विभिन्न व्यक्तियों को खेती के लिए पट्टे के रुप में देता चला आ रहा था। यह

भी कथन किया गया कि खेवट संख्या 96 में प्रार्थी विभाग की भूमि पर सेन्ट्रल गर्वमेन्ट की भूमि आख्या में दर्शित की गयी है जबकि खेवट में विवादित भूमि के मालिक काबिज सिचाई है तथा मौ० उमर पुत्र अयूब का नाम फर्जी रुप से दर्ज चला आ रहा है। प्रार्थना पत्र के अन्त में विवादित खसरा नम्बर 385/1 नदी के खाते व खसरा नम्बर 319 मकबूजा है आगरा नहर ओखला नई दिल्ली के नाम दर्ज किये जाने की याचना की गयी। पट्टे पर देने हेतु एवं अन्य कागजात छाया प्रतियां संलग्न की गयी है। वर्णित भूमि को सरकार द्वारा सिचांई विभाग लिए गजट नम्बर 11971 दिनांक 19 मई 1873 द्वारा छोडी गयी भूमि है, जिस पर मौ० उमर पुत्र अय्यूब का नाम फर्जी रुप से दर्ज चला आ रहा है। ऐसा कोई साक्ष्य पत्रावली पर दाखिल नही है। जिससे राजस्व अभिलेखो में सिचाई विभाग का नाम दर्ज हुआ हो। धारा 33/39 भू-राजस्व अधिनियम के अन्तर्गत किसी गजट के आधार पर अधिकार प्रदान नही किये जा सकते हैं। यह अनुतोष सिचाई विभाग सक्षम धारा में वाद योजित कर अपना नाम दर्ज करा सकता है। इस प्रकार वाद निरस्त किया जना अभिष्ट एवं न्यायोचित है।

<u>आदेश</u>

उपरोक्त विवेचना का आधार पर श्रीमती कमर सुलताना पत्नी इकबाल अहमद निवासी मकान नम्बर 526 मोहल्ला किशनगंज कस्बा पिलखुवा तहसील व जिला हापुड द्वारा प्रार्थना पत्र दिनांक 02.12.2015 का प्रार्थना पत्र बलहीन होने के कारण निरस्त किया जाता है। <u>भू-राजस्व अधिनियम की धारा 33/39 अन्तर्गत किसी गजट या कब्जे के आधार पर सिंचाई विभाई को भी कोई अधिकार प्रदान नहीं किया जा सकता है। ग्राम कैला परगना लौनी की नान जेड.ए. फसली 1412 महाल के खेवट संख्या 96 सैन्ट्रल गर्वमेन्ट आदि के खाता संख्या 209 नम्बर 319 खसरा नम्बर 319 रकबई 53-9-0 खसरा नम्बर 385/1 रकबई 18-17-0 कुल नम्बरान दो कुल रकबा 72-6-0 पर श्रेणी 10क पर से मौ० उमर पुत्र अय्यूब अली निवासी ग्राम का नाम खारिज किया जाय। वाद उपरोक्त में वर्णित भूमि पर मिल्कियत सरकार का नाम दर्ज किया जाय।</u> वाद उपरोक्त में न्यायालय द्वारा पारित आदेश की अभिलेखो में प्रविष्ट हेतु परवाना दो प्रतियों में तहसीलदार गाजियाबाद को भेजा जाय। द्वितीय प्रति पर इस आशय की टिप्पणी सहित कि अमलदरामद कर दिया गया है, एक सप्ताह के अन्दर न्यायालय हाजा में भिजवाना सुनिश्चित किया जाय। तदोपरांत इस न्यायालय की पत्रावली बाद आवश्यक पूर्ति अभिलेखागार में संचित हो।"

8. Aforesaid order was thereafter challenged at the behest of appellants/contesting respondents by way of filing a revision petition before Board of Revenue, U.P., Lucknow. Said revision

petition was allowed vide order dated 01.05.2018 whereby impugned order therein dated 22.08.2016 was set aside and it was directed that name of appellants/contesting respondents in Class 10-A (non occupancy tenants) could not be expunged in a summary proceedings arising out of Section 33/39 of Act of 1901 and it was also observed that since land in dispute falls within a Non-Z.A. area, therefore, the occupants could be evicted only under relevant provisions of U.P. Tenancy Act, 1939 (for short "Act of 1939"). Relevant part thereof is quoted below :-

"10. अभिलेखों से जैसा कि स्पष्ट है, खतौनी फसली 1363 से 1412 फसली तक में लगातार विवादित आराजी पर मो. उमर पुत्र अय्यूब अली का नाम "श्रेणी 10क गैर दाखिलकार" काश्तकार के रूप में दर्ज चली आ रही है, जहां तक रक्षा मंत्रालय भारत सरकार का प्रश्न है, पत्रावली में डिफेंस स्टेटस आफीसर, मेरठ सर्किल, मेरठ कैण्ट का प्रिंसिपल डायरेक्टर, डिफेन्स स्टेटस, गर्वन्मेंट आफ इण्डिया, मिनिस्ट्री आफ डिफेन्स, सेन्ट्रल कमाण्ड, 17 करिअप्पा रोड, लखनऊ कैण्ट को सम्बोधित एवं अधिशासी अभियन्ता हेड वर्क्स खण्ड, आगर नहर औखला, नई दिल्ली को पृष्ठांकित पत्र संख्या 1427/एम, दिनांक 19.11.2014 में यह उल्लेख किया गया है कि विवादित आराजी से रक्षा मंत्रालय भारत सरकार का कोई सम्बन्ध नहीं है, अतः उनके स्तर से इस वाद में कोई कार्यवाही की जानी अपेक्षित नहीं है। उक्त के परिप्रेक्ष्य में विवादित आराजी पर से सेन्ट्रल गवर्नमेन्ट का नाम अंकित किये जाने का कोई औचित्य नहीं प्रतीत होता है। जहां तक सिचाई विभाग अधिशासी अभियन्ता हेड वर्क्स खण्ड, आगर नहर औखला, नई दिल्ली के पुर्नस्थापन प्रार्थना पत्र का सम्बन्ध है, सिंचाई विभाग का नाम किसी भी राजस्व अभिलेखों में अभी तक दर्ज नहीं है, हालांकि उनके द्वारा विवादित आराजी के वर्ष 1954 से लेकर 1999 तक मो. उमर पुत्र अय्यूब अली के नाम समय समय पर किये गये पट्टे की फोटो प्रतियां दाखिल की गयी है। विद्वान उपजिलाधिकारी गाजियाबाद द्वारा सिंचाई विभाग के इस दावे को इस आधार पर नहीं स्वीकार किया गया कि उनके द्वारा अपना नाम विवादित आराजी पर दर्ज कराने की कोई कार्यवाही नहीं की गयी है। सिंचाई विभाग द्वारा आदेश दिनांक 22.08.2016 के विरूद्ध भी कोई निगरानी किसी न्यायालय में दायर नहीं की गयी।

11. प्रतिपक्षी मो. उमर पुत्र अययूब अली का मृत्यु प्रमाण पत्र परीक्षण न्यायालय की पत्रावली पर उपलब्ध है और मृतक मो. उमर के वारिसान की ओर से प्रतिस्थापन प्रार्थना पत्र दिनांक 12.09.2011, मय शपथ पत्र एवं धारा 5 मियाद अधिनियम के अंतर्गत विलम्ब मर्षण के प्रार्थना पत्र सहित उपलब्ध है, फिर भी विद्वान उपजिलाधिकारी द्वारा प्रतिपक्षी मो. उमर (मृतक) के वारिसान को उसके स्थान पर प्रतिस्थापित नहीं किया गया

और मृतक के विरूद्ध विवादित आदेश एकपक्षीय रूप से पारित करते हुए मृतक मो. उमर पुत्र अययूब अली का नाम विवादित आराजी से काट दिया गया। स्पष्ट है कि विद्वान उपजिलाधिकारी द्वारा निगरानी संख्या 84/2007-08 में पारित अपर आयुक्त मेरठ मण्डल, मेरठ के आदेश दिनांक 12.08.2010 में दिये गये निर्देश का पालन भी नहीं किया गया है। निगरानीकर्ता के विद्वान अधिवक्ता द्वारा 2006(24) एलसीडी 110 अपील संख्या 4802-03 वर्ष 2005 " किशुन उर्फ रामकिशुन (मृतक) द्वारा कानूनी वारिसान बनाम बिहारी (मृतक) द्वारा कानूनी वारिसान" में पारित माननीय सर्वोच्च न्यायालय के आदेश दिनांक 05.08.2005 को संदर्भित किया गया जिसमें माननीय सर्वोच्च न्यायालय द्वारा निम्न विधि व्यवस्था प्रतिपादित की गयी हैः-

" As rightly poined out by learned counsel for the appellants and fairly agreed to by learned Senior Counsel for the respondent, the decree passed by the High Court in favour of a party who was dead and against a party who was dead, is obviously a nullity. It is conceded that the legal representatives of neither of the parties were brought on record in the second appeal and the second appeal stood abated. On this ground this appeal is liable to be allowed and the decision of the High Court set aside"

12. इसके अलावा राजस्व परिषद की वृहद पीठ द्वारा निगरानी संख्या 2126/2016/मुरादाबाद "पंकज सरीन बनाम उपजिलाधिकारी बिलारी आदि" में पारित आदेश दिनांक 29.01.2018 में भी यह प्रतिपादित किया गया कि बिना सुनवाई का अवसर दिये राजस्व अभिलेखों में दर्ज किसी व्यक्ति का नाम धारा 33/39 उ.प्र.भू-राजस्व अधिनियम, 1901 के अंतर्गत नहीं काटा जा सकता और न ही किसी मृत व्यक्ति के विरूद्ध कोई आदेश पारित किया जा सकता है।

13. निगरानीकर्तागण के पति/पिता मो. उमर का नाम वर्ष 1954 से अब तक लगातार विवादित आराजी पर " श्रेणी-10क गैर - दाखिलकार" के रूप में दर्ज चला आ रहा है, तो इस इन्द्राज को धारा 33/39 उ.प्र.भूराजस्व अधिनियम, 1901 की सरसरी कार्यवाही मे नहीं काटा जा सकता है। नान जेड.ए. क्षेत्र में किसी भूमि पर दर्ज किसी व्यक्ति को 'यू.पी.टेनेन्सी एक्ट, 1939' के सुसंगत प्राविधानों के अंतर्गत ही बेदखल किया जा सकता है।

14. अतः उपरोक्त तथ्यात्मक एवं विधिक विवेचना के आलोक में विद्वान उपजिलाधिकारी द्वारा पारित आदेश दिनांक 22.08.2016 विधिक दृष्टि से त्रुटिपूर्ण होने के कारण निरस्त किये जाने योग्य है, जिसे निरस्त किया जाता है तथा निगरानी स्वीकार की जाती है। आदेश की प्रति सहित अवर न्यायालय के अभिलेख वापस किये जाये। बाद आवश्यक कार्यवाही पत्रावली दाखिल दफ्तर हो।

15. आदेश आज दिनांक 01.05.2018 को खुले न्यायालय में उदघोषित किया गया।"

9. Aforesaid order has been challenged by the State of U.P. along with Irrigation Department at belated stage i.e. after about 5 years on 21.04.2023.

10. In the interregnum period, appeallants have filed a suit in the year 2023 for permanent injunction claiming that they are "संक्रमणीय भूमिधर" on land in dispute and since defendants i.e. employees of Irrigation Department are trying to interfere with their possession on 05.12.2023, therefore, a cause of action arose for filing the suit.

11. In above proceedings, an application for interim injunction under Order 39 Rule 1 and 2 CPC was also filed. Said application (application 6-C) was considered, however, it was dismissed vide order dated 14.03.2024 by Civil Judge, Senior Division, Ghaziabad that neither prima facie case was made out nor there was a balance of convenience in favour of plaintiffs/appellants as well as they have failed to show any irreparable loss. A finding was also returned that appellants/contesting respondents have no right on land since it was granted on a lease though many years ago, however, after 30.09.1997, it was not extended. Relevant part of order is quoted below :-

"1- प्रथम दृष्टया केस-

वादीगण द्वारा मुख्य रूप से अभिकथन किया गया है कि आराजी गाटा सख्या 319 व 385 के वादीगण संक्रमणीय भूमिधर मालिक काबिज हैं। विवादित भूमि वादीगण पर वादीगण के पिता का नाम राजस्व रिकार्ड में दर्ज चला आ रहा है। वादीगण के पिता का देहान्त हो जाने के उपरान्त विवादित सम्पत्ति प क 11 के आधार पर विरासत के आधार पर वादीगण व वादीगण की माता श्रीमती हमीदा बेगम का नाम राजस्व रिकार्ड में दर्ज हो गया है। राजस्व बोर्ड के आदेश दिनांक 01.05.2018 में भी वादीगण का नाम राजस्व रिकार्ड में माना गया है। विवादित भूमि के असल स्वामी वादीगण हैं। वादी द्वारा प्रस्तुत आदेश राजस्व बोर्ड दिनांक 01.05.2018 के अवलोकन से विदित होता हैकि राजस्व बोर्ड ने यह आदेश किया है कि बिना सुनवाई का अवसर दिये राजस्व अभिलेखों से किसी का नाम धारा 33/39 राजस्व अधिनियम काटा नहीं जा सकता। राजस्व बोर्ड द्वारा दिनांक 22.08.2016 के उपजिलाधिकारी के आदेश को निरस्त किया गया। प्रतिवादी द्वारा मुख्य रूप से यह अभिकथन किया गया कि उपरोक्त भूमि सिंचाई विभाग को हिण्डन कटा बीयर / नहर परियोजना के निर्माण हेतु गजट नोटिफिकेशन संख्या 11971 दिनांक 19.05.1873 के द्वारा प्राप्त हुई थी। यह भूमि अभिलेखों में नान जेड-ए लैंड अंकित है। प्रश्नगत भूमि राज्य सरकार सिचाई विभाग की सम्पत्ति है। सिंचाई विभाग द्वारा वादी के पिता मौ० उमर को दिनांक 01.06.1954 से 01. 10.1982 तक गाटा संख्या 319 रकबा 53 बीघा 9 विस्वा

का पट्टा 5 वर्ष के लिए दिया गया, जो बाद में नवीनीकरण हेतु रहा। राज्य सरकार के शासनादेश दिनांक 01.10.1982 के द्वारा 5 एकड़ से अधिक भूमि किसी एक व्यक्ति के नाम पट्टे पर नहीं दी जा सकती है, जिसके क्रम में मौ० उमर को 59 बीघा 9 विस्वा में से मात्र 8 बीघा का पट्टा दिया गया तथा अवशेष भूमि 45 बीघा 9 विस्वा को वापस ले लिया गया। जिसके समपर्ण हेतु मौ० उमर द्वारा दिनांक 01.10.1982 को प्रार्थनापत्र दिया गया। उक्त कथनों के आधार पर वादी ने दावा किया है। राजस्व बोर्ड के उपरोक्त आदेश के विरूद्ध माननीय उच्च न्यायालय में रिट योजित है। वादी को गुजर बसर करने के उद्देश्य से पट्टा दिया गया था। दिनांक 30.09.1997 के बाद पट्टा विस्तारित नहीं किया गया। वादी का कोई स्वामित्व नहीं है। विवादित राजकीय भूमि 53 बीघा 9 विस्वा पर अधीक्षण अभियन्ता ड्रेनेज मण्डल, गाजियाबाद के कार्यालय एवं मण्डल कार्यालय के स्टाफ आवासों का निर्माण होना प्रस्तावित है। जिसका मानचित्र विभागीय उच्चाधिकारियों द्वारा स्वीकृत कर निर्माण हेतु वित्तीय स्वीकृति जारी कर दी गयी है। निर्माण कार्य प्रारम्भ हो गया है। प्रतिवादीगण द्वारा अपने अभिकथनों के समर्थन में प्रपत्र प्रस्तुत किये गये हैं। जिसके अवलोकन से प्रकट होता है कि उक्त भूमि मौ० उमर को पट्टे पर दी गयी थी, जिसे दिनांक 01.10.1982 को शासनादेश के अनुक्रम में 45 बीघा 9 विस्वा भूमि का समर्पण मौ० उमर द्वारा किया गया, शेष भूमि का पट्टा नवीनीकरण अन्तिम रूप से दिनांक 01.10.1992 से 30.09.1997 तक स्वीकृत हुआ। इसके उपरान्त दिनांक 22.09.1999 के कार्यालय ज्ञाप / शासनादेश के अनुसार सिंचाई विभाग की भूमि को पट्टे पर दिये जाने के समस्त आदेश तत्काल प्रभाव से स्थगित कर दिये गये।

7- उल्लेखनीय है कि वादी द्वारा स्वयं को विवादित भूमि का संक्रमणीय भूमिधर मालिक काबिज बताया गया है, जबकि पत्रावली पर दाखिल प्रतिवादी के प्रपत्रों से स्पष्ट है कि उक्त विवादित भूमि प्रतिवादी सिंचाई विभाग द्वारा वादी के पिता को पट्टे पर दी गयी थी। राजस्व बोर्ड के आदेश से भी स्पष्ट है कि उक्त भूमि पर वादी के पिता का नाम श्रेणी 10क दाखिलकार के रूप में है। अतः यह कहना कि वादीगण विवादित भूमि के संक्रमणीय भूमिधर हैं प्रथम दृष्टया असत्य प्रकट हो रहा है। यह भी उपरोक्त प्रपत्रों से स्पष्ट है कि वादी के पक्ष में किया गया पट्टा दिनांक 30.09.1997 से विस्तारित नहीं है एवं विवादित भूमि पर सिंचाई विभाग द्वारा राजकीय आवास के निर्माण हेतु वित्तीय स्वीकृति का कार्य प्रारम्भ किया गया है। अतः प्रथम दृष्टया प्रकरण वादीगण के पक्ष में बनना नहीं पाया जाता है। ऐसी स्थिति में सुविधा का सन्तुल भी वादी के पक्ष में नहीं है। चूंकि उपरोक्त

भूमि वादी के नाम संक्रमणीय भूमिधर नहीं है, बल्कि वादी को जो भी अधिकार प्रदान किया गया था वह सिंचाई विभाग द्वारा पट्टे के आधार पर दिया गया था। अतः ऐसी स्थिति में अपूर्णनीय क्षति की भी संभावना नहीं है। अतः प्रार्थनापत्र 6ग निरस्त किये जाने योग्य है।

आदेश

वादीगण का प्रार्थनापत्र 6ग निरस्त किया जाता है। तद्नुसार प्रतिवादी की आपत्ति निस्तारित की जाती है। पत्रावली वाद बिन्दु दिनांक 27.03.2024 को पेश हो।"

12. Aforesaid order is impugned by appellants/contesting respondents in FAFO.

13. Learned Senior Advocates appearing for appellants/contesting respondents have submitted that their predecessors in interest were occupant of land in dispute which remains continued and presently, they are in the possession of land in dispute. A long entry is being recorded in revenue records being Class 10-A (non occupancy tenants) which has not been disturbed. An attempt of State/Irrigation Department was failed since revision petition filed by them in proceedings U/s 33/39 of Act of 1901 was rejected that in said proceedings long revenue entry could not be disturbed and State remained silent for about 5 years and when appellants/contesting respondents filed the suit for permanent injunction, they rushed to this Court by way of filing aforesaid writ petition.

14. Learned Senior Advocates have further submitted that their possession may be protected and not only they have prima facie cause but balance of convenience is also in their favour and in case temporary injunction is not granted, it will result in irreparable loss.

15. Both Senior Advocates have also submitted that claim of State/Irrigation Department on basis of patta under Government Grants Act has no legal value since they have never tried to correct the entries of its basis for many decades as well as that said document is still not proved in any Civil Court.

16. In support of their argument, they have placed reliance upon judgments of **Lallu Yeshwant Singh (Dead) by his LRs vs. Rao Jagdish Singh and others, AIR 1968 SC 620, State of U.P. and others vs. Maharaja Dharmender Prasad Singh, AIR 1989 SC 997, Anathula Sudhakar vs. P. Buchi Reddy (D) by LRs. and others, (2008) 4 SCC 594, Pratap Singh (D) through LRs and others vs. Shiv Ram (D) through LRs., (2020) 11 SCC 242 and Ravindra Singh and others vs. State of U.P. and others, 2022:AHC:117007.**

17. Learned Senior Advocates have also submitted that order passed in revision by Board of Revenue in the year 2018 is being challenged after 5 years, therefore, this writ petition may be dismissed on latches as well as that a writ petition against mutation proceedings is maintainable only in extraordinary circumstances which does not exist in present case.

18. Per contra, learned counsel appearing for writ petitioners/defendants in FAFO has submitted that land in dispute is a Non-Z.A. land and by referring a photocopy of a lease purportedly issued

under Government Grants Act to predecessors of appellants/contesting respondents that it was submitted that it was a lease by Government of India and only on basis of entry under Class 10-A (non occupancy tenants), predecessors as well as appellants would not become owner of land.

19. Learned counsel has referred that documents annexed along with writ petition and counter affidavit that land belongs to State of UP which is now being utilized for a construction of a wall around a barrage.

20. Learned counsel has also submitted that if a title is highly disputed, temporary or permanent injunction cannot be granted as well as that proceedings U/s 33/39 of Act of 1901 are summary in nature, therefore, it cannot be a basis of title in favour of appellants.

21. Learned counsel has further submitted that there is a bar under Section 242 of U.P. Tenancy Act, 1939 that no suit can be entertained by a Civil Court for any question relating to tenancy. He refers Section 31 of it which defines non occupancy tenants that they are other than permanent tenure-holders and since lease was not extended, therefore, appellants/contesting respondents have no claim on land in dispute.

22. Learned counsel has also submitted that findings returned by Board of Revenue in revision petition were essentially that appellants/contesting respondents were not heard, however, instead of remanding the matter to Court concerned, has decided the same, which was an erroneous approach.

23. Learned counsel have placed reliance upon judgments of **Muhammad Khalilur Rahman Khan vs. Mohammad Muzammilullah Khan, AIR 1933 ALL 468, Durga Prasad vs. Board of Revenue, Allahabad AIR 1970 ALL 159, Basdeo and others vs. Board of Revenue, Allahabad, AIR 1974 ALL 337, Paras Nath vs. Board of Revenue, Allahabad, AIR 1986 ALL 111, Kashi Math Sansthan and another vs. Shrimad Sudhindra Thirta Swamy and another, (2010) 1 SCC 689, Tehsildar, Urban Improvement Trust and another vs. Ganga Bai Menariya (D) through LRs and others, Civil Appeal No. 722 of 2012, decided on 20.02.2024, State of U.P. vs. Ram Prasad Saxena, First Appeal No. 566 of 1996, decided on 14.08.2012 and Kayalulla Parambath Moidu Haji vs. Namboodiyil Vinodan, Civil Appeal No. 5575-76 of 2021, decided on 07.09.2021.**

24. Heard learned counsel for parties and perused the record.

25. It is clear from above referred rival submissions that title of appellants/contesting respondents on land in dispute is still highly disputed. Except the revenue entries as Class 10-A (non occupancy tenants), appellants have not shown the source of their occupancy. They have not approached concerned Court under U.P. Tenancy Act, 1939 to crystalize their rights. It is also well settled that in proceedings arising out of Section 33/39 of Act of 1901, issue of title cannot be decided since they are summary in nature for a purpose of collection of taxes.

26. State/Irrigation Department have placed reliance on photocopies of patta issued to predecessors of appellants/contesting respondents under Government Grants Act. At this stage, said document cannot be rejected only on ground that it being a photocopy since

under the Indian Evidence Act, a document which is more than 30 years old and is being produced from custody which the Court in a particular case considers proper, it may be presumed to be genuine if not proved otherwise. At this stage, it cannot be doubted that said document was not produced from a proper custody.

27. In aforesaid circumstances, a judgment passed by Supreme Court in **TV Ramakrishna Reddy vs. M. Mallappa and another, (2021) 13 SCC 135** wherein it was reiterated that where the plaintiffs' title is not in dispute or under a cloud, a suit for injunction could be decided with reference to findigns of possession. However, if the matter involves complicated question of law and fact relating to title, the Court will relegate the parties to a remedy by way of a comprehensive declaration of title, instead of deciding the issue in a suit for mere injunction. For reference, relevant paras thereof are quoted below :-

"13. The short question that falls for consideration before us is : Whether the learned Single Judge of the High Court was right in holding that the suit simpliciter for permanent injunction without claiming declaration of title, as filed by the plaintiff, was not maintainable?

14. The issue is no more res integra. The position has been crystallised by this Court in Anathula Sudhakar v. P. Buchi Reddy [Anathula Sudhakar v. P. Buchi Reddy, (2008) 4 SCC 594] in para 21, which read thus : (SCC pp. 607-608)

"21. To summarise, the position in regard to suits for prohibitory injunction relating to immovable property, is as under:

(a) Where a cloud is raised over the plaintiff's title and he does not have possession, a suit for declaration and possession, with or without a consequential injunction, is the remedy. Where the plaintiff's title is not in dispute or under a cloud, but he is out of possession, he has to sue for possession with a consequential injunction. Where there is merely an interference with the plaintiff's lawful possession or threat of dispossession, it is sufficient to sue for an injunction simpliciter.

(b) As a suit for injunction simpliciter is concerned only with possession, normally the issue of title will not be directly and substantially in issue. The prayer for injunction will be decided with reference to the finding on possession. But in cases where de jure possession has to be established on the basis of title to the property, as in the case of vacant sites, the issue of title may directly and substantially arise for consideration, as without a finding thereon, it will not be possible to decide the issue of possession.

(c) But a finding on title cannot be recorded in a suit for injunction, unless there are necessary pleadings and appropriate issue regarding title (either specific, or implied as noticed in *Annaimuthu Thevar [Annaimuthu Thevar v. Alagammal, (2005) 6 SCC 202] ).* Where the averments regarding title are absent in a plaint and where there is no issue relating to title, the court will not investigate or examine or render a finding on a question of title, in a suit for injunction. Even where there are necessary pleadings and issue, if the matter involves complicated questions of fact and law relating to title, the court will relegate the parties to the remedy by way of comprehensive suit for declaration of title, instead of deciding the issue in a suit for mere injunction.

(d) Where there are necessary pleadings regarding title, and appropriate issue relating to title on which parties lead

evidence, if the matter involved is simple and straightforward, the court may decide upon the issue regarding title, even in a suit for injunction. But such cases, are the exception to the normal rule that question of title will not be decided in suits for injunction. But persons having clear title and possession suing for injunction, should not be driven to the costlier and more cumbersome remedy of a suit for declaration, merely because some meddler vexatiously or wrongfully makes a claim or tries to encroach upon his property. The court should use its discretion carefully to identify cases where it will enquire into title and cases where it will refer to the plaintiff to a more comprehensive declaratory suit, depending upon the facts of the case."

15. It could thus be seen that this Court in unequivocal terms has held that where the plaintiff's title is not in dispute or under a cloud, a suit for injunction could be decided with reference to the finding on possession. It has been clearly held that if the matter involves complicated questions of fact and law relating to title, the court will relegate the parties to the remedy by way of comprehensive suit for declaration of title, instead of deciding the issue in a suit for mere injunction.

16. No doubt, this Court has held that where there are necessary pleadings regarding title and appropriate issue relating to title on which parties lead evidence, if the matter involved is simple and straightforward, the court may decide upon the issue regarding title, even in a suit for injunction. However, it has been held that such cases are the exception to the normal rule that question of title will not be decided in suits for injunction."

28. In above background, another judgment passed by the Supreme Court in case of **P. Kishore Kumar vs. Vittal K. Patkar, 2023 SCC Online SC 1483** would also be relevant that revenue records are not documents of title and that the mutation in revenue records neither create nor extinguishes title, nor does it have presumptive value on title. For reference, relevant paras thereof are quoted below :-

"12. It is trite law that revenue records are not documents of title.

13. This Court in Sawarni v. Inder Kaur2 held that mutation in revenue records neither creates nor extinguishes title, nor does it have any presumptive value on title. All it does is entitle the person in whose favour mutation is done to pay the land revenue in question.

14. This was further affirmed in Balwant Singh v. Daulat Singh (Dead) by LRs3 wherein this Court held that mere mutation of records would not divest the owners of a land of their right, title and interest in the land.

15. In Jitendra Singh v. State of Madhya Pradesh4, this Court after considering a catena of judgments, reiterated the principle of law as follows:

"6. ***mutation entry does not confer any right, title or interest in favour of the person and the mutation entry in the revenue record is only for the fiscal purpose."

16. We may also profitably refer to the decision of this Court in Sita Ram Bhau Patil v. Ramchandra Nago Patil (Dead) by LRs., (1977) 2 SCC 49 wherein it was held that there exists no universal principle that whatever will appear in the record of rights will be presumed to be correct, when there exists evidence to the contrary."

29. On basis of above referred facts and law, at this stage, it is very clear that

claim of appellants/contesting respondents on land in dispute i.e. their alleged title is highly disputed. Their claim is essentially based on a revenue entry which is under Class 10-A (non occupancy tenants) in a Non Z.A. land whereas from the documents on record which are more than 30 years old, produced from a proper custody has a presumptive value that land in dispute was granted to predecessors of appellants on lease under Government Grants Act which was not extended after 1997.

30. A simple denial on behalf of appellants/contesting respondents to said document could not be accepted especially when they have never filed any suit under U.P. Tenancy Act to crystalize their rights, therefore, I am of considered opinion that in view of T.V. Ramakrishna Reddy (supra), since title is highly disputed, therefore, relief sought for interim injunction is rightly rejected by trial Court. Therefore, there is no illegality in impugned order, hence, present FAFO stands dismissed.

31. So far as present writ petition is concerned, State/Irrigation Department has approached this Court after about 5 years, though explanation mentioned in writ petition is not happily worded except reference to some judgments on issue. Still considering that above referred facts clearly depicts that appellants/contesting respondents have not able to prove their title on basis of above referred entry as well as that Revisional Court, on one hand, returned a finding that impugned order therein was passed without hearing the appellants/revisionists but on other hand, returned a finding that long revenue entry could not expunged in a summary proceedings without appreciating the documents placed before it as well as their legal value and the law on issue, therefore, Court is of considered opinion that impugned order in present form passed by Board of Revenue does not survive, hence, set aside and matter is remitted back to Board of Revenue to decide the same fresh and in case it is found that matter was required to be heard by affording opportunity to both parties which was not granted by S.D.M. while passing the order dated 22.08.2016, the matter may be remitted back to said Authority or if the Board of Revenue thinks fit that issue can be decided by Board itself, a reasoned order will be passed after hearing rival parteis expeditiously, preferably within six months.

32. In overall circumstances, connected FAFO stands **dismissed** and present writ petition stands **allowed** in part with above observations.

33. This order will not come in the way if the rival parties approach concerned Court under U.P. Tenancy Act to crystalize their right in accordance with law, if so advised.

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**(2024) 11 ILRA 196**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 22.11.2024**

**BEFORE**

**THE HON'BLE SAURABH SHYAM SHAMSHERY, J.**

Writ- B No. 2398 of 2019

**Shahid Hussain ...Petitioner**
**Versus**
**Board of Revenue U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**

Arvind Srivastava, Deepak Kumar Pandey, Krishna Kumar Singh, Rituvendra Singh Nagvanshi

**Counsel for the Respondents:**
Arun Kumar Srivastava, C.S.C., Dharm Vir Jaiswal, Harsh Vikram, Manoj Kumar Sharma, Shri Ram Pandey

**(A) Land Laws and Specific Performance - Agreement to Sale and Adverse Possession - Concurrent findings of Revenue Courts under challenge - U.P. Zamindari Abolition and Land Reforms Act, 1950 - Section 209 - Ejectment of persons occupying land without title , Section 210 - Consequence of failure to file a suit under Section 209 - Section 229-B - Suit for declaration of rights - Executory Contract - Permissive Possession - Adverse Possession - Specific Performance - Provisions of Sections 209 and 210 of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 do not apply to cases where possession is permissive, such as under an executory contract of sale -Possession under an executory contract of sale is permissive and does not constitute adverse possession.(Para - 15,17,18)**

Petitioner claimed possession over a plot under an agreement to sell executed in 1973 - with partial payment made and possession given - sale deed was never executed - Petitioner filed a suit for specific performance in 2011 - later sought declaration under Section 229B of U.P. Zamindari Abolition and Land Reforms Act, 1950 - dismissed by three revenue courts - claiming ownership based on adverse possession. (Paras - 2 to 9)

**HELD:-** Possession under an agreement to sale is permissive, not adverse, and thus cannot form the basis for claiming title under Section 210 of the Act. Petitioner failed to establish adverse possession or ownership under law. No ground to interfere in concurrent findings of three Revenue Courts. (Para - 18,19)

**Petition dismissed.** (E-7)

**List of Cases cited:**

1. Puttu Singh & ors. Vs Kirat Singh & ors., 1966 R.D. 42

2. Bharit & ors. Vs The Hon'ble B.O.R, U.P. at Alld. & ors., AIR 1973 ALL. 201

3. Achal Reddy Vs Ramakrishana Reddiar & ors., (1990) 4 SCC 706

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

## Factual Matrix

1. An agreement to sale dated 12.11.1973 was executed by father of original Respondent-4 in favour of petitioner with regard to plot in dispute i.e. plot no. 1141, area 1 acre 07 dismal, located at Village Pakbara, Tehsil and District Moradabad, for Rs. 9,000/- out of which Rs. 7,000/- was paid and possession of property was given to petitioner and rest of Rs. 2000 was required to be paid at the time of execution of sale deed.

2. Petitioner remained silent for many decades and kept waiting for execution of sale-deed and finally filed a suit for specific performance in the year 2011. The relevant relief sought in suit is mentioned hereinafter :-

*" (अ) यह कि वादी द्वारा योजित प्रस्तुत मूलवाद हेतु संविदा के विनिर्दिष्ट अनुपालन की आज्ञप्ति पारित की जाकर प्रस्तुत मूलवाद के प्रतिवादी को आदेश दिया जाये कि वह न्यायालय द्वारा अनुमन्य अवधि के अन्दर वादी के पक्ष में निष्पादित विक्रय अनुबन्ध पत्र दिनांकित*

*12.11.1973 के अनुपालन में वादी से विक्रय प्रतिफल की शेष धनराशि अंकन रूपये 2000/- (दो हजार) प्राप्त कर प्रस्तुत मूलवाद में वर्णित सम्पत्ति कृषि भूमि गाटा क्रमांक 141 जिसका क्षेत्रफल 0-4330 हे० तथा भूराजस्व अंकन रूपये 21-40 पैसे स्थित ग्राम पाकबडा तहसील व जनपद मुरादाबाद का विक्रय पत्र वादी के पक्ष में विधिवत रूप में निष्पादित कराकर कार्यालय उपनिबंधक, मुरादाबाद में नियमानुसार पंजीकृत करा दे, प्रतिवादी द्वारा उक्त में विफल रहने के परिणामस्वरूप न्यायालय की सहायता से उक्त वर्णित प्रश्नगत सम्पत्ति कृषि भूमि गाटा क्रमांक -1141 जिसका क्षेत्रफल- 4330 हे० तथा भूराजस्व अकंन रू० 21.40 पैसे स्थित ग्राम पाकबडा तहसील व जनपद मुरादाबाद का विक्रय पत्र वादी के पक्ष में निष्पादित किया जाकर नियमानुसार उपनिबन्धक, मुरादाबाद में पंजीकृत कराकर उक्त वर्णित सम्पत्ति / कृषिभूमि पर वास्तविक भूस्वामी एवं संक्रमणीय भूमिधर के रूप में पुनः सांकेतिक रूप में अधिपत्य स्थापित करा दिया जाये।"*

3. The above suit is still pending. An Amin's report dated 16.08.2017 submitted in said suit is placed on record that the petitioner is in possession of plot in dispute.

4. In the same year original Respondent-4 has filed a suit for permanent injunction against petitioner, which is also still pending. An Amin's report dated 30.05.2011 was submitted in said suit is also on record that petitioner has possession over plot in dispute.

5. In the same year, petitioner has also filed a suit under Section 229-B of U.P. Zamindari Abolition and Land Reforms Act, 1950 *(hereinafter referred to as "Act, 1950")* that he be declared "संक्रमणीय भूमिधर काश्तकार" over plot in dispute since his possession on plot in dispute was more than 12 years and that original contesting respondent has failed to execute agreement for sale. In written statement contesting defendant/original contesting respondent denied execution of agreement to sale.

6. In above suit following issues were framed:-

*"क- यह कि घोषणात्मक डिक्री इस अमर की फरमाई जावे की वादी प्रश्नगत आराजी काश्त गाटा सं० - 1141 रकबई 0.433 है० मौजा पाकबडा तहसील व जिला मुरादाबाद व संक्रमणीय भूमिधर काश्तकार है तथा इसका अमलदरामद कागजात माल में कराया जावे।*

*ख- यह कि वाद का हर्जा एवं खर्चा वादी को प्रतिवादीगण से दिलाया जावे।*

*ग- यह कि अन्य कोई अनुतोष जो मुफीद वादी हो न्यायालय उचित समझे वादी को दिलाया जावे।*

7. The above suit was dismissed vide order dated 17.09.2018 on ground that,

agreement to sale was not executed and even original contesting respondent had no power to execute the agreement to sale, since he was only a Sirdar, who could not execute a sale-deed or agreement to sale and possession if any, was only permissive that with permission of contesting original respondent/ original defendant. Relevant part of it is reproduced hereinafter :-

*"विद्वान अधिवक्ताओं के तर्कों को सुनने के पश्चात् वाद में निर्धारित वाद बिन्दुओं का निस्तारण निम्न प्रकार किया जाता है।*

*1. क्या वादी विवादित सम्पत्ति पर काबिज है और वादी कब्जे के आधार पर विवादित संम्पत्ति का स्वामी व भूमिधर है। यदि हाँ तो उसका प्रभाव?*

*उक्त वाद बिन्दु को सिद्ध करने का भार वादी पर है। वादी के द्वारा अपने मौखिक साक्ष्य में स्वयं को व गवाह मौ० याकूब व यशपाल सिंह को परीक्षित कराया है। वादी शाहिद हुसैन ने जिरह में स्वयं कहा है कि "प्रश्नगत मुआयदाबय कचहरी में लिखा गया था, पहले बताया कि घर पर लिखा गया था। जिस दिन मुआयदाबय लिखा गया उस दिन कचहरी खुल रही थी या बन्द थी मुझे याद नहीं मुझे यह भी याद नहीं कि मुआयदाबय जिस दिन लिखा गया उस दिन कौन-कौन लोग आये थे यह मुआयदाबय रजिस्टर्ड कराया या नहीं इसकी मुझे जानकारी नहीं है। मुझे यह भी नहीं पता कि नन्हे अनपढ़ आदमी थे या नहीं मुझे यह भी याद नहीं कि मुआयदाबय की तहरीर पर नन्हे के अंगूठे हैं या हस्ताक्षर? यह रूपये नन्हे की बीमारी के समय अकेले में दिये थे नन्हे ने मुझे आराजी निजाई का कब्जा तहरीर लिखने के बाद दिया था। वादी शाहिद हुसैन जिरह में यह साबित नहीं कर पाये कि मुआयदाबय कहाँ हुआ था धनराशि 7000/- के सम्बन्ध में यह साबित नहीं कर पाये कि रुपये उसने नन्हे को अकेले में दिये थे या किसी के सामने दिये थे। इस प्रकार मुआयदाबय का निष्पादन भली प्रकार सिद्ध नहीं है। जहाँ तक प्रश्नगत भूमि पर कब्जा होने के सम्बन्ध में उसमें शाहिद हुसैन ने स्वयं कहा कि उनका कब्जा नन्हे की रजामन्दी से है। इस सम्बन्ध में प्रतिवादी के विद्वान अधिवक्ता की ओर से प्रस्तुत किये गये तर्क पर बल पाता हूं कि काश्तकार की इजाजत से हुए कब्जे के आधार पर किसी व्यक्ति के भौमिक अधिकार परिपक्व नहीं होते। इस प्रकार वादी अपने वाद पत्र में किये गये कथनों के गौसवाना कब्जे के आधार पर प्रश्नगत भूमि का संक्रमणीय भूमिधर घोषित किया जाये सिद्ध नहीं है।*

*<u>प्रतिवादी के विद्वान अधिवक्ता का यह भी तर्क है कि यदि नन्हे द्वारा प्रश्नगत भूमि का वादी के पक्ष में मुआयदाबय लिखा भी गया होता तो उक्त मुआयदाबय एक शून्य दस्तावेज की श्रेणी में हुआ क्योंकि नन्हे अपने आजीवन प्रश्नगत भूमि के सीरदार काश्तकार रहे और सीरदार काश्तकार को भूमि के</u>*

सम्बन्ध में कोई हस्तान्तरण विलेख निष्पादित करने का अधिकार प्राप्त नहीं है। उनका यह भी तर्क है कि वादी के पक्ष में मुआयदाबय होने की स्थिति में भी उन्हें प्रश्नगत भूमि पर कब्जे के आधार पर कोई अधिकार प्राप्त नहीं होते। उन्होंने अपने इस तर्क के समर्थन में आर.डी. 2017 पृष्ठ 71 राधा स्वामी सत्संग बनाम स्टेट आफ यू.पी. व आर.डी. 2005 (99) पृष्ठ 672 अशोक कुमार द्विवेदी बनाम अष्ठम अपर जिला जज व आर.डी. 2015 (129) पृष्ठ 7 इन्द्रपाल देव बनाम डिप्टी डायरेक्टर ऑफ कंसोलीडेशन, व आर.डी. 1985 पृष्ठ 292 ब्रह्मा बनाम बोर्ड आफ रेवेन्यू प्रस्तुत करते हुए तर्क दिया कि मुआयदाबय के आंशिक अनुपालन में दिये गये कब्जे के आधार पर धारा-164 जि०वि०अधि० के प्रावधान लागू नहीं होते। मैं प्रतिवादी के विद्वान अधिवक्ता की ओर से प्रस्तुत किये गये तर्कों एवं उनकी ओर से प्रस्तुत की गयी विधि व्यवस्थाओं के आधार पर इनके तर्कों में बल पाता हूँ और वादी के विद्वान अधिवक्ताओं के तर्कों में कोई बल नहीं पाता हूँ। प्रश्नगत भूमि पर यदि वादी का कब्जा मान भी लिया जाये तो भी वादी को उसके आधार पर प्रश्नगत भूमि पर किसी प्रकार के भौमिक अधिकार प्राप्त नहीं होते। इसके अतिरिक्त पत्रावली पर उपलब्ध उद्धरण खतौनी वर्ष 1417-1422 से स्पष्ट है कि राजस्व अभिलेखों में प्रश्नगत भूमि प्रतिवादी श्री शमशुद्दीन पुत्र नन्हे निवासी ग्राम पाकबडा मुरादाबाद का नाम दर्ज चला आ रहा है इस सम्बन्ध में वादी के द्वारा सक्षम न्यायालय में भी कोई चाराजोई नहीं की गई। अतः वाद बिन्दु संख्या-1 नकारात्मक रूप से वादी के विरूद्ध निर्णीत किया जाता है।

वाद बिन्दु संख्या -2- क्या वादी का वाद पोषणीय नहीं है।

इस वाद बिन्दु को सिद्ध करने का भार प्रतिवादी पक्ष पर है। वाद बिन्दु सं० 1 में की गयी विवेचना के आधार पर वादी का वाद पोषणीय नहीं हो पाता है। तथा यह वाद बिन्दु सकारात्मक रूप से प्रतिवादी सं० -1 शमशुद्दीन के पक्ष में निस्तारित किया जाता है।

वाद बिन्दु संख्या -3- क्या वादी अन्य कोई अनुतोष पाने का अधिकारी है।

वाद बिन्दु सं०-1 व वाद बिन्दु सं०-2 की, की गई विवेचना पर वादी किसी अनुतोष को पाने का अधिकारी नहीं है। अतः दावा वादी निरस्त होने योग्य है, निरस्त किया जाता है।

आदेश

सम्यक विचारोपरान्त दावा वादी निरस्त किया जाता है। यदि कोई स्थगन आदेश हो तो उसे निरस्त किया जाता है। वाद अमल दरामद पत्रावली आवश्यक कार्यवाही दाखिल दफ्तर हो।"

8. The aforesaid judgment was challenged by way of filing of an appeal before the Commissioner, Moradabad

however, it was dismissed by order dated 25.05.2018. Relevant part thereof is reproduced hereinafter:-

*"उक्त तर्को एवं अवर न्यायालय की सम्बन्धित वाद पत्रावली पर उपलब्ध अभिलेखों के अनुसार मैं अपीलकर्ता के विद्वान अधिवक्ता के उक्त तर्को में कोई बल नहीं पाता हूँ क्योंकि वादी द्वारा अपने वाद पत्र में किसी भी प्रक्रम में या किसी भी प्रस्तर में भूमि पर कब्जा मुखालफाना का कोई तथ्य ही अंकित नहीं किया, बल्कि उनके द्वारा स्वयं अपने वाद पत्र के पैरा-02 व पैरा-06 में यह तथ्य अंकित किये गये हैं कि प्रतिवादी के पिता नन्हें पुत्र इतवारी के विक्रय हेतु अनुबन्ध कर धनराशि प्राप्त कर उन्हें इस भूमि पर कब्जा करा दिया गया। इस प्रकार यह कब्जा किसी भी प्रकार से कब्जा मुखालफाना की श्रेणी में नहीं आता, बल्कि स्वीकृति से कब्जे की श्रेणी में आता है, जिसके आधार पर कोई भी लाभ दिये जाने का प्राविधान जमींदारी विनाश अधिनियम में नहीं है। इसके अतिरिक्त, यह तथ्य अत्यन्त महत्वपूर्ण एवं प्रासंगिक है कि वर्ष 1973 जिस समय कि वादी विक्रय हेतु अनुबन्ध के सम्बन्ध में रसीद अवर न्यायालय की पत्रावली पर कागज सं0-3/8 के रूप में प्रस्तुत करते हैं। तत्समय प्रतिवादी के पिता उक्त भूमि के सीरदार थे और सीरदार को भूमि को विक्रय करने का कोई अधिकार प्राप्त नहीं था, जबकि वर्ष 1975 तक समस्त धनराशि प्राप्त कर भूमि को विक्रय किये जाने का कथन वादी द्वारा किया गया है। ऐसी स्थिति में जबकि 1977 से पूर्व किसी भी सीरदार को भूमि को विक्रय करने से पूर्व 10 गुना या 20 गुना जमा कर भूमिधरी के अधिकार प्राप्त करने होते थे और कोई भी सनद या ऐसा कोई तथ्य भी कभी वादी द्वारा अपने कथन में अंकित नहीं किया गया, तब ऐसी स्थिति में यह विक्रय हेतु अनुबन्ध किये जाने का या विक्रय किये जाने का कोई भी अधिकार प्रतिवादी सं0-01 के पिता को नहीं था। यद्यपि उक्त अनुबन्ध एक अनुबन्धित विलेख है जो साक्ष्य में ग्राह्य नहीं है, परन्तु उसको भी निष्पादित किये जाने का कोई अधिकार प्रतिवादी सं0-01 के पिता को नहीं था। इस कारण वादी अपने वाद को साबित करने में पूर्णतया विफल रहा है, जिसको अवर न्यायालय द्वारा विभिन्न वाद बिन्दुओं में की गयी विवेचना में स्पष्ट किया गया है। अवर न्यायालय द्वारा पारित आदेश एक न्यायोचित आदेश है। अपीलकर्ता द्वारा ऐसे कोई साक्ष्य एवं तथ्य प्रस्तुत नहीं किये गये, जिससे कि अवर न्यायालय के प्रश्नगत आदेश में किसी हस्तक्षेप का औचित्य पाया जाये। अतः उक्त तथ्यों के परिप्रेक्ष्य में अपीलकर्ता की अपील बलहीन होने के कारण निरस्त किये जाने योग्य है।"*

9. A challenge to aforesaid order was referred preferred before the Board of

Revenue by way of filing a second appeal, which got dismissed by order dated 09.08.2018, at the stage of admission. Relevant part of order is reproduced hereinafter:-

"*मैंने उभयपक्ष के विद्वान अधिवक्ता के तर्कों को सुनने एवं पत्रावली पर उपलब्ध साक्ष्यों/अभिलेखों का परिशीलन किया। पत्रावली के अवलोकन से विदित होता है कि नन्हे पुत्र इतवारी द्वारा शाहिद हुसैन को विक्रय हेतु अनुबंध किया गया था, जबकि नन्हे विवादित भूमि के सीरदार थे उन्हे सीरदार की भूमि को अनुबंध/विक्रय का कोई अधिकार नहीं था और वादी शाहिद हुसैन द्वारा कोई ऐसा साक्ष्य अपने वाद में प्रस्तुत किये जिससे मे बल हो। दोनो पक्षों को सुनने एवं विधि व्यवस्थाओं के परीक्षणों/विवेचना के आधार पर दोनों अवर न्यायालयों द्वारा समान तथ्यों के आधार पर आदेश पारित किया गया है। इसमें हस्तक्षेप किये जाने की आवश्यकता नहीं है। इस प्रकार द्वितीय अपील ग्राह्यता स्तर पर निरस्त किये जाने योग्य है।*

*अतः उपरोक्त तथ्यों के आधार पर द्वितीय अपील ग्राह्या स्तर पर निरस्त किया जाता है। बाद आवश्यक कार्यवाही दाखिल दफ्तर हो।* "

**Argument on behalf of Petitioner**

10. Sri R.C. Singh, learned Senior Advocate, assisted by Sri Deepak Kumar Pandey, learned counsel for petitioner, argued that since no proceeding was taken by father of original defendant/ original respondent under Section 209 of Act, 1950 (Ejectment of persons occupying land without title) within the prescribed limitation, therefore, its consequence as provided under Section 210 of Act, 1950 would follow i.e. petitioner would become Bhumidhar, however, all Revenue Courts failed to appreciate it.

11. Learned Senior Advocate further submitted that agreement to sale as well as petitioner's possession over plot in dispute was not disputed and whether vendor had power to execute the agreement or not was not the issue before Revenue Courts, therefore, it was wrongly considered against petitioner/plaintiff.

12. Petitioner/ plaintiff has perfected his right on basis of adverse possession. Learned Senior Advocate has placed reliance on **Puttu Singh and others Vs. Kirat Singh and others, 1966 R.D. 42 and Bharit and others Vs. The Hon'ble Board of Revenue, U.P. at Allahabad and other, AIR 1973 ALL. 201.**

**Argument of Contesting Respondent**

13. Sri N.C. Rajvanshi, learned Senior Advocate assisted by Sri Ram Pandey, learned counsel appearing for Respondent-4, i.e., contesting respondent by referring Sections 209 and 210 of Act, 1950 argued that petitioner would not fall within the ambit of 'persons' mentioned in Section 209 of Act, 1950 since according to his case he was put in possession on plot in dispute with consent of vendor, whereas to avail consequence of not filing a suit under Section 209 of Act, 1950 as provided under Section 210 of Act, 1950 would be available only if possession was without

consent of Bhumidhar, which is not the case in hand.

**Discussion and Analysis**

14. Present case requires interpretation of Sections 209 and 210 of Act, 1950 and for reference both are reproduced hereinafter:-

209. ***Ejectment of persons occupying land without title.--*** *(1) A person taking or retaining possession of land otherwise than in accordance with the provisions of the law for the time being in force; and-*

*(a) where the land forms part of the holding of a bhumidhar, or asami without the consent of such bhumidhar, or asami;*

*(b)where the land does not form part of the holding of a bhumidhar, or asami without consent of the Gaon Sabha, shall be liable to ejectment on the suit in cases referred to in Clause (a) above of the bhumidhar, or asami concerned and in cases referred to in Clause (b) above of the Gaon Sabha and shall also be liable to pay damages.*

*(2) To every suit relating to a land referred to in Clause (a) of sub-section (1) the State Government shall be impleaded as a necessary party."*

***"210. Consequence of failure to the suit under Section 209.--****If a suit for eviction from any land under Section 209 is not instituted by a bhumidhar or asami, or a decree for eviction obtained in any such suit is not executed within the period of limitation provided for institution of such suit or the execution of such decree, as the case may be, the person taking or retaining possession shall-*

*(a) where the land forms pail of the holding of a bhumidhar with transferable rights, become a bhumidhar with a transferable rights of such land and the right, title and interest of an asami, if any, in such land shall be extinguished;*

*(b) where the land forms part of the holding of a bhumidhar with non-transferable rights, become a bhumidhar with non-transferable rights I and the right, title and interest of an asami, if any, in such land shall be I extinguished;*

*(c) where the land forms part of the holding of an asami on behalf of the Gaon Sabha, become an asami of the holding from year to year.*

*Provided that the consequences mentioned in Clauses (a) to (c) shall not ensue in respect of any land held by a bhumidhar or asami belonging to a Scheduled Tribe."*

15. A plain reading of Section 209(a) of Act, 1950, pre-supposes that possession was without consent of Bhumidhar, Sirdar or Asami or the Gram Sabha and if possession of person was a permissive one, a suit cannot be maintained under Section 209 of Act, 1950, therefore, its consequence as contemplated in Section 210 of Act, 1950 would not follow.

16. If case of petitioner is considered in view of averments, it would be a case of an "executory contract" since possession was handed over only on basis of "agreement to sale", awaiting complete execution of remaining conditions of said sale and only after its execution, it would become a 'sale' when title of property got vested with purchaser.

17. Supreme Court in the case of **Achal Reddy Vs. Ramakrishana Reddiar and others, (1990) 4 SCC 706** has considered a difference between an 'executory contract' and 'sale' and for

reference its para 9 and 10 being relevant are mentioned hereinafter :-

*"9. There is no controversy that the plaintiff has to establish subsisting title by proving possession within 12 years prior to the suit when the plaintiff alleged dispossession while in possession of the suit property. The first appellate court as well as the second appellate court proceeded on the basis that the plaintiff is not entitled to succeed as such possession has not been proved. The concur- rent findings that the plaintiff had title inspite of the decree for specific performance obtained against him, when that decree had not been executed are not assailed by the appellant in the High Court. The appellant cannot, there- fore, urge before us on the basis of the findings in the earlier suit to which he was not a party that Ex. A. 1 sale deed is one without consideration and does not confer valid title on the plaintiff. The sole question that has been considered by the High Court is that of subsisting title. We have to consider whether the question of law as to the character of the possession Varada Reddi had between 10.7.1946 and 17.7.1947 is adverse or only permissive. In the case of an agreement of sale the party who obtains possession, acknowledges title of the vendor even though the agreement of sale may be invalid. It is an acknowledgement and recognition of the title of the vendor which excludes the theory of adverse possession. The well-settled rule of law is that if person is in actual possession and has a right to possession under a title involving a due recognition of the owner's title his possession will not be regarded as adverse in law, even though he claims under another title having regard to the well recognised policy of law that possession is never considered adverse if it is referable to a lawful title. The purchaser who got toto possession under an executory contract of sale in a permissible charac- ter cannot be heard to contend that his possession was adverse. In the conception of adverse possession there is an essential and basic difference between a case in which the other party is put in possession of property by an outright transfer, both parties stipulating for a total divestiture of all the rights of the transferor in the property, and in case in which, there is a mere executory agreement of transfer both parties contemplating a deed of transfer to be executed at a later point of time. In the latter case the principle of estoppel applies estopping the transferee from contending that his possession, while the contract remained executory in stage, was in his own right and adversely against the transferor. Adverse possession implies that it commenced in wrong and is maintained against right. When the commencement and continuance of possession is legal and proper, referable to a contract, it cannot be adverse.*

*10. In the case of an executory contract of sale where the transferee is put in possession of the property in pursuance of the agreement of sale and where the parties contemplate the execution of a regular registered sale deed the animus of the purchaser throughout is that he is in possession of the property belonging to the vendor and that the former's title has to be perfected by a duly executed registered deed of sale under which the vendor has to pass on and convey his title. The purchaser's possession in such cases is of a derivative character and in clear recognition of and in acknowledgement of the title of the vendor. The position is different in the case where in pursuance of an oral transfer or a deed of transfer not registered the owner of a property transfers*

*the property and puts the transferee in possession with the clear animus and on the distinct understanding that from that time onwards he shall have no right of title to the property. In such a case the owner of the property does not retain any vestige of right in regard to the property and his mental attitude towards the property is that it has ceased to belong to him altogether. The transferee after getting into possession retains the same with the clean animus that he has become the absolute owner of the property and in complete negation of any right or title of the transferor, his enjoyment is solely as owner in his right and not derivatively or in recognition of the title of any person. So far as the vendor is concerned both in mind and actual conduct, there is a total divestiture of all his right, title and interest in the property. This applies only in a case where there is a clear manifestation of the intention of the owner to divest himself of the right over the property. On the other hand in the case of an executory contract the possession of the transferee until the date of registration of the conveyance is permissive or derivative and in law is deemed to be on behalf of the owner himself. The correctness of the decision in Annamalai v. Muthiah (supra) cannot, therefore, be doubted."*

*(Emphasis supplied)*

18. The above consideration is squarely applicable in present case on facts also that a purchaser who got into possession under an executory contract of sale would be on only permissive in character, he cannot contend that his possession was adverse and it will remain as a permissive possession in contradiction to a possession in the case of sale. Judgments relied by learned Senior Advocate for petitioner in **Puttu Singh (supra)** and **Bharit (supra)** would, therefore, not be applicable in present case since it was in regard to 'sale' and not in regard to an 'executory contract'. Present case is squarely covered by **Achal Reddy (supra)** on facts as well as on law against the petitioner's case.

**Conclusion**

19. The outcome of above discussion is that there is no ground to interfere in concurrent findings of three Revenue Courts. Therefore, present writ petition is accordingly, dismissed.

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**(2024) 11 ILRA 205**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 21.11.2024**

**BEFORE**

**THE HON'BLE SAURABH SHYAM SHAMSHERY, J.**

Writ- B No. 3143 of 1993

**Beer Singh ...Petitioner**
**Versus**
**Board of Revenue Alld. & Ors. ...Respondents**

**Counsel for the Petitioner:**
C.S. Sharma, A.K. Sharma, Ajai Shankar Pathak, R.P. Singh

**Counsel for the Respondents:**
D.N. Tyagi, A.B.L. Gaur, Amar Jeet Singh, Ashish Kumar Shukla, Deepak Sharma, G.M. Tripathi, Gayyoor Ali, Girish Chandra Shukla, H.N. Sharma, Mahima Kushwaha, Mukesh Kumar Kushwaha, P.S. Chauhan, Raj Kamal Singh, Raj Kishore Yadav, Rajiv Sisodia, S.C.

**(A) Land Revenue Law - U.P. Zamindari Abolition and Land Reforms Act, 1950 - Section 198(2) - Writ jurisdiction - Article**

**226 - Court of law - Court having extraordinary, equitable and discretionary jurisdiction - In extraordinary circumstances the High Court under writ jurisdiction may exercise equitable jurisdiction in the interest of justice would be relevant - Cardinal principle of exercise of extraordinary jurisdiction - In a given case, even if some action or order challenged in the writ petition is found to be illegal and invalid, the High Court while exercising its extraordinary jurisdiction thereunder can refuse to upset it with a view to doing substantial justice between the parties - power to pass such orders as public interest dictates & equity projects.(Para - 18)**

Dispute arose regarding piece of land - being part of two resolutions (1972 and 1975) - for allotment of Patta under provisions of U.P.Z.A. - 1972 resolution, though upheld, was not acted upon - 1975 resolution granted possession to petitioners - Petitioners were beneficiaries under the 1975 resolution - their possession protected by interim orders for decades - earlier resolution was later challenged on equity grounds.
(Para – 1 to 10)

**HELD:-** Court exercised equitable jurisdiction. Set aside orders dated 24.09.1992 and 15.07.1981. Protected petitioners' possession and directed fresh allotment proceedings to include eligible contesting respondents. (Para - 19)

**Petition disposed of.** (E-7)

**List of Cases cited:**

C.C.R.A.S. & anr. Vs Bikartan Das & ors., 2023 INSC 733

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

1. In the present case, a piece of land was being part of two resolutions for allotment of Patta under the provisions of U.P. Zamindari Abolition and Land Reforms Act, 1950, which has created a controversy and matter is reached upto this Court.

2. First resolution was adopted on 11.09.1972 and number of beneficiaries were 58. It was challenged before Additional Collector, however, rejected by order dated 10.09.1973. Surprisingly, despite this writ petition is pending for last more than three decades, copy of same was not placed on record.

3. Said order was challenged before Commissioner and a reference dated 10.06.1974 was prepared, however, copy of same is also not on record. Said reference was accepted by Board of Revenue vide order dated 29.04.1977 and revision was dismissed. Copy of order was placed on record by way of filing a supplementary affidavit and for reference the same is reproduced hereinafter:

*"This is a revision petition against the order dated 10.09.1973 passed by Additional Collector, Saharanpur, in a case u/s 198(2) of the U.P. Z.A. & L.R. Act.*

*2. No objection has been filed against the recommendation of the Additional Commissioner. I have gone through the record. Agreeing with the recommendation of the Additional Commissioner, I dismiss the revision."*

4. During pendency of above revision, said land was again become a subject matter of a subsequent resolution dated 28.12.1975 and number of beneficiaries were 90. Said resolution was challenged, however, except that some of the beneficiaries were removed from list on the ground that they were not qualified, rest of resolution was upheld vide order dated 30.03.1978. Surprisingly, earlier resolution dated 11.09.1972 as well as proceedings

referred above which reached till Board of Revenue, were not even referred in said order.

5. Above referred order dated 30.03.1978 was challenged and a reference dated 15.07.1981 was made. Relevant part of the order dated 30.03.1978 and reference dated 15.07.1981 is reproduced hereinafter:

Relevant part of order dated 30.03.1978:

*"लेखपाल के बयान तथा तहसील आख्या से यह सिद्ध होती है कि प्रस्ताव दिनांक 28-12-1975 की समस्त कार्यवाही नियमानुसार की गई है जो लेखपाल के बयान तथा अन्य साक्ष्यों से यह भी सिद्ध होता है कि प्रस्ताव के समय विवादित भूमि खाली थी और गाँव सभा सम्पत्ति थी जिसको आबन्टन करने का पूरा अधिकारी भू० प्र० स० को था ।*

*वादी पक्ष के विद्वान अभिभाषक ने मेरा ध्यान लेखपाल के बयान की ओर आकर्षित किया तथा तर्क किया कि इस प्रस्ताव द्वारा कुछ ऐसे व्यक्तियों को आबन्टन किया गया है जो पात्र व्यक्ति नहीं थे और उनमें से कुछ के पास 12 एकड़ से भी अधिक भूमि है। लेखपाल के बयान से यह सिद्ध होता है कि महावीर तथा सतबिरम के पिता के पास 12 एकड़ से अधिक भूमि है और सब इकट्ठे ही रहते है। इसके अतिरिक्त दयाराम, रघुवीर तथा समवा पुत्रगण नरपत तथा कलीराम तथा बीर के पास आबन्टन से पूर्व 55 बीघा पुख्ता से अधिक भूमि थी। और वर्तमान विवादित प्रस्ताव द्वारा उनके पक्ष में 2-2 बीघा पुख्ता भूमि का आबन्टन और कर दिया गया है जिस कारण से उन सबके पास 31/8 एकड़ से अधिक भूमि हो गई है जो कानून के अर्न्तगत नहीं हो सकती है।*

*जहाँ तक शेष व्यंक्तियों के आबन्टन का प्रश्न है लेखपाल के बयान से सि.. कि वे भूमिहीन तथा खेतिहर मजदूर है और उनके पास किसी के पास भी अलाट शुदा भूमि को सम्मिलित करते हुये 31/8 एकड से अधिक भूमि नहीं है। इस कारण शेष व्यक्तियों के पक्ष में किया गया प्रस्ताव नियमित है और उसमें किसी प्रकार कौहित की आवश्यकता मै नहीं समझता हूँ ।*

*अतः विपक्षीगण सिधा पुत्र बारु, सरथा, रघुवीर तथा दया राम पुत्रगण नरपत कलोराम पुत्र बारू तथा महावीर एवं सतबिरम पुत्रगण रतन के पक्ष में किया गया प्रस्ताव निरस्त किया जाता है विवादित भूमि खसरा नम्बर 344/1-4-0, 341/0-16-0, 341/2--0, 4/0-9-15, 1-0/0-9-10, 341/1-4-0, 292/0-12-0, 293/0-13-0, 294/0-12, 290/0-2-0, 292/0-2-0, 136/2-6-7, 300/2-0-0 तथा 300/2-0-0 ग्राम सभा में नीहित की जाती है। विपक्षीगण को तुरन्त विवादित भूमि से बेदखल किया जावे तथा राजस्व अभिलेख तदानुसार दुरूस्त किये जावे। भू०प्र०सं० विवादित भूमि का कब्जा विपक्षीगण से प्राप्त करें।*

*आदेश की प्रति तहसीलदार/भू० प्र०स० को सुचनार्थ तथा आवश्यक कार्यवाही हेतु भेजी जावे।"*

Relevant part of order dated 15.07.1981:

*"माननीय राजस्व परिषद के आदेश दिनाँक 29-4-77 को देखने से स्पष्ट है कि आबन्टन दिनाँक 11-9-72 को वैध माना गया है अतः जब तक राजस्व परिषद की इस फाइन्डिंग को किसी उच्च न्यायालय से रद्द नहीं किया जाता तब तक यह नहीं समझा जा सकता कि वह आबन्टन अवैध है। 11-9-72 का आबन्टन जब तक वैध है तब तक गाँव सभा को दुबारा इस भूमि का आबन्टन करने का कोई अधिकार नहीं है।*

*उपरोक्त परिस्थिति में अवर न्यायालय का आदेश गलत है ।*

*निगरानी स्वीकार किये जाने की संस्तुति माननीय राजस्व परिषद से की जाती है। तथा अवर न्यायालय का आदेश निरस्त किया जाता है ।*

*असन्तुष्ट पक्ष अपनी आपत्ति यदि कोई हो 30 दिन के अन्दर प्रस्तुत कर सकता है ।"*

6. Thereafter, Board of Revenue accepted the reference and revision was allowed vide order dated 24.04.1992 and relevant part thereof is mentioned hereinafter:

*"5. स्पष्ट है कि जो आबन्टन जिला वगैरह को 11-9-72 को हुआ था वह अन्ततोगत्वा राजस्व परिषद द्वारा 24-7-77 को बैध माना गया, जब इसे चुनौती नहीं दी जा सकती और एक बार आबन्टित भूमि दोबारा किसी को आबन्टित नहीं की जा सकती। जिला के लिए यह जरूरी नहीं था कि सभी आबन्टियों को फरीक बनाये क्यों कि सन् 75 के प्रस्ताव में और भी भूमि निहित है वह केवल उसी भूमि के आबन्टन को चुनौती दे सका था जो सन् 72 के प्रस्ताव में थी और उन व्यक्तियों को फरीक बनाया गया। यदि कुछ भूखण्ड आबादी हो गये हैं तो आबादी की भूमि से किसी को बेदखल नहीं किया जा सकता। जहाँ तक चारागाह सुरक्षित करने का प्रश्न है एक बार आबन्टित भूमि को दोबारा अाबन्टन करने का अधिकार गाँव सभा को नहीं था। इन परिस्थितियों में बाद का आबन्टन अवैध है।*

*विपाक्षीगण के विद्वान अधिवक्ता ने यह भी तर्क प्रस्तुत किया कि आबन्टिगण भूमिहिन हरिजन है अतः उन्हें कब्जे के आधार पर धारा 122 बी (4-एफ) के अन्तर्गत असंक्रमणीय भूमिधर के अधिकार मिलने चाहिए, मै इस तर्क से सहमत नहीं हूँ। जो भूमि एक बार आबान्टित कर दी गयी है उस पर यदि किसी का कब्जा भी है और पट्टे के आधार पर वह काबिज है तो उस कब्जे के आधार पर किसी को अधिकार नहीं मिल सकते। अपर जिलाधिकारी के निर्णय के अवलोकन से स्पष्ट है कि उन्होंने 11-9-72 के प्रस्ताव*

*को प्रस्ताव ही नहीं माना क्यों कि न इसका अमलदरामद किया गया और न कोई पट्टा लिया गया। यह वैधानिक स्थिति उचित नहीं है। जब प्रस्ताव को ही चुनौती दे दी गयी तो जब तक मुकदमा अंतिम रूप से निर्णीत न हो पट्टा करने का प्रश्न ही नहीं था। अपर जिलाधिकारी को राजस्व परिषद का आदेश हो जाने के बाद 11-9-72 के प्रस्ताव में कोई भी कमी निकालने का कोई अधिकार ही नहीं था। वह मामला अब अन्तिम हो चुका है। यह भी तर्क प्रस्तुत किया गया कि 28-12-75 के आबन्टिन के समय जब एक बार प्रस्ताव हो गया तो यदि कब्जा नहीं दिलाया गया और मुकदमा चलने लगा तो उससे भूमि खाली है या नहीं इससे कोई अन्तर नहीं पड़ेगा ।*

*7. इन परिस्थितियों में अपर आयुक्त की सुस्तुति पूर्णतया स्वीकार करने योग्य है अतः मैं यह सन्दर्भ स्वीकार करके निगरानी स्वीकार करते हुए अपर जिलाधिकारी का आदेश इस सीमा तक संशोधित करता हूँ कि 11-9-72 के प्रस्ताव द्वारा जो भूमि जिला तथा अन्य व्यक्तियों को आबन्टित की गयी है उस भूमि का आबन्टन दोबारा करना अवैध है और वह आबन्टन निरस्त किया जाता है।"*

7. Aforesaid orders are challenged before this Court at the behest of petitioners, i.e., as many as 64 beneficiaries of subsequent resolution.

8. This Court vide order dated 03.02.1993 directed that writ petitioners will not be dispossessed from land in dispute in pursuance of impugned order.

9. Sri Ajay Kumar Sharma, learned counsel for petitioners submitted that earlier resolution dated 11.09.1972 was void ab initio since it was neither approved nor it was acted upon, whereas proceedings arising out of subsequent resolution dated 28.12.1975 were not only with prior approval but it was acted upon so much as that allotted land was handed over to its beneficiaries, i.e., atleast to the petitioners.

10. Learned counsel for petitioners further referred few paragraphs of counter affidavit filed by State-Respondents that it was admitted that a meeting of Land Management Committee of concerned Gaon Sabha was conducted on 11.09.1972 but it was not approved. Learned counsel also submitted that equity is in favour of petitioners as their possession is protected since 1975 and even by this Court for last more than three decades.

11. Per contra, Sri Rajeev Sisodia as well as Sri Girish Chandra Shukla, Advocates for contesting-respondents, submitted that once the earlier resolution dated 11.09.1972 was got confirmed upto Board of Revenue, Gaon Sabha was not empowered to put the said land for the purpose of allotment of Patta again and he referred relevant paragraphs of impugned orders dated 15.07.1981 and 24.09.1992, which were passed on same reasons. They further submitted that question of equity will rise only if subsequent resolution dated 28.12.1975 was legally adopted, however, the facts as referred above and noted in impugned orders, the said exercise of allotment was void ab initio.

12. Sri Abhishek Kumar Srivastava, learned Additional Chief Standing Counsel for State-Respondents, has not denied that resolution dated 11.09.1972 was adopted but it was not approved in accordance with law, however, he also referred later part of counter affidavit that legal position, so far as no subsequent resolution could be adopted of the same land when earlier resolution was specifically stated and that it was rightly upheld by impugned orders and that in subsequent part of counter affidavit the averments of writ petition were specifically denied.

13. Heard learned counsel for parties and perused the material available on record.

14. The Court has heard this matter in writ jurisdiction under Article 226 of the Constitution which undisputedly not only a Court of law but it is a Court having extraordinary, equitable and discretionary jurisdiction also.

15. As referred above, a challenged to earlier resolution dated 11.09.1972 got failed and it was upheld up to Board of Revenue by order dated 29.04.1977 which has attained finality, therefore, without taking note of it a subsequent resolution for allotment of land and consequent granting possession on face of it was erroneous.

16. The question, whether earlier resolution was ever approved, could not be looked into without challenge to it. However even in such circumstances a fact remained undisputed that subsequent resolution was admittedly approved and possession was handed over to its beneficiaries atleast to the petitioners and is being protected for last three and half decades on basis of an interim order of this Court, whereas admittedly no possession was handed over to beneficiaries in pursuance of earlier resolution.

17. In these circumstances this Court has to balance equity between petitioners' possession which is protected for last many decades without any dispute as they are eligible persons for allotment though procedure might not be proper and the earlier resolution which was upheld upto the Board of Revenue but no possession was handed over to its beneficiaries i.e. admittedly not acted upon. Therefore, the Court is of considered opinion that at this stage, in case petitioners are dispossessed they will be more prejudiced and will suffer irreparable loss in comparison to the beneficiaries of earlier resolution, who were never put into possession of allotted land.

18. At this stage, the Court refers relevant part of a judgment passed by Supreme Court in the case of **Central Council for Research in Ayurvedic Sciences and another vs. Bikartan Das and others, 2023 INSC 733** that in extraordinary circumstances the High Court under writ jurisdiction may exercise equitable jurisdiction in the interest of justice would be relevant and it's para 51 is, therefore, reproduced hereinafter:

*"51. The second cardinal principle of exercise of extraordinary jurisdiction under Article 226 of the Constitution is that in a given case, even if some action or order challenged in the writ petition is found to be illegal and invalid, the High Court while exercising its extraordinary jurisdiction thereunder can refuse to upset it with a view to doing substantial justice between the parties. Article 226 of the Constitution grants an*

*extraordinary remedy, which is essentially discretionary, although founded on legal injury. It is perfectly open for the writ court, exercising this flexible power to pass such orders as public interest dictates & equity projects. The legal formulations cannot be enforced divorced from the realities of the fact situation of the case. While administering law, it is to be tempered with equity and if the equitable situation demands after setting right the legal formulations, not to take it to the logical end, the High Court would be failing in its duty if it does not notice equitable consideration and mould the final order in exercise of its extraordinary jurisdiction. Any other approach would render the High Court a normal court of appeal which it is not."*

*(Emphasis supplied)*

19. In aforesaid circumstances, equitable jurisdiction of this Court is being exercised and possession of petitioners only is protected. Impugned judgment and orders dated 24.09.1992 and 15.07.1981 are interfered and accordingly set aside. However, it is directed that State will conduct a fresh allotment proceedings and will include contesting-respondents, if still they are eligible for allotment under relevant provisions, including others also. Said exercise will be concluded within a period of six months from today, if there is no legal impediment.

20. With aforesaid observations/ directions, this writ petition is disposed of.

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**(2024) 11 ILRA 211**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 19.11.2024**

**BEFORE**

**THE HON'BLE CHANDRA KUMAR RAI, J.**

Writ- B No. 3319 of 2022

**Suraj Singh @ Suraj Dev ...Petitioner**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Bhupendra Kumar Yadav, Dinesh Rai, Manvendra Nath Singh

**Counsel for the Respondents:**
C.S.C., Shri Krishan Yadav, Vishnu Murti Tripathi

**(A) Land Law - Consolidation of Holdings - Orders regarding Chak allotment under U.P.C.H. Act under challenge - Uttar Pradesh Consolidation of Holdings Act, 1953 - Section 19 - Conditions for Consolidation Scheme, Section 21(2) - Appeals , Section 48 - Revisional Powers of Deputy Director - Compact area - Source of irrigation – Rectangulation - Chak Objection - Chak Appeal - Chak revision - Tenure holder be allotted Chak as far as possible on his original largest holding considering the source of irrigation of tenure holder copuled with the process of rectangulation of Chak of tenure holder.(Para -11)**

Petitioner, holder of Chak Nos. 799 and 800 - challenged allocation of chaks made under consolidation proceedings - objection was partially allowed by Consolidation Officer - subsequent appeal and revision were dismissed - sought allotment on his original holdings (536 and 539) - claiming that current allocation (496 and others) was unfit for cultivation due to its L-shape - which was denied by authorities. (Para 2, 4)

**HELD: -** Petitioner's allotment of Chak to his source of irrigation was adjusted on plot no. 496. No illegality in allotment of the Chak to the petitioner by Consolidation Officer. Consolidation Officer dismissed an appeal to allocate the Chak to other holdings. Deputy Director of Consolidation also dismissed a revision under

Section 48 of the U.P.C.H. Act. No scope of interference against the impugned orders. (Para -10,12)

**Petition dismissed**. (E-7)

(Delivered by Hon'ble Chandra Kumar Rai, J.)

1. Heard Sri Dinesh Rai, learned counsel for the petitioner, Shri V.K. Singh, learned Senior Counsel assisted by Sri S.K. Yadav as well as Sri V.M. Tripathi, learned counsel for respondent nos. 5, 6 & 7 and Sri Ashutosh Kumar Rai, learned Additional Chief Standing Counsel for the State.

2. Brief facts of the case are that petitioner is Chak Holder of Chak No. 799 & 800. Respondent No. 5 is Chak Holder No. 65. The Assistant Consolidation Officer has proposed single Chak to the petitioner on plot nos. 489M, 496M, 505M. Against the proposal of Assistant Consolidation Officer the Chak Objection was filed by petitioner, which was decided by Consolidation Officer vide order dated 11.02.2020 allotting the Plot No. 496, in which his source of irrigation is situated along with the Plot No. 505. Petitioner was also allotted Plot No. 500, 499 under the order of Consolidation Officer dated 11.02.2020. Against the order of Consolidation Officer petitioner filed Chak Appeal before the Settlement Officer Consolidation claiming that he should be allotted Chak over plot nos. 536 & 539 in place of plot nos. 499 & 500. The aforementioned appeal filed by the petitioners was dismissed vide order dated 23.12.2020. Petitioner challenged the appellate order by way of revision under Section 48 of the U.P.C.H. Act, which was dismissed by Deputy Director of Consolidation vide order dated 15.09.2022. Hence, this writ-petition for following reliefs:-

***"I) Issue a writ, order or direction in the nature of certiorari quashing the order dated 11.02.2020 passed by respondent no. 4 in so far it relates to Chak no. 800, order dated 23.12.2020 passed by respondent no. 3 in Appeal No. 40 of 2020, under section 21(2) of U.P.C.H. Act and order dated 15.9.2022 passed by respondent no. 2 in Revision No. 175/2021530126000033, under section 48(1) of U.P.C.H. Act.***

***II) Issue a writ order or direction in the nature of mandamus directing the respondents not to give effect to the impugned orders and direct the parties to maintain status quo on spot.***

***III) Issue any other writ order or direction, which this Hon'ble Court may deem fit and proper under the facts and circumstances of the present case.***

***IV) To award the cost of writ petition."***

3. This Court entertained the matter and granted interim order on 01.12.2022. In pursuance of the order dated 01.12.2022 pleadings have been exchanged between the parties.

4. Learned counsel for the petitioner submitted that the Chak Appeal filed by petitioner against the illegal order of Chak allotment passed by Consolidation Officer has been dismissed in arbitrary manner without considering the demand of the petitioner in accordance with law. He further submitted that Settlement Officer Consolidation has not considered the provisions of Section 19 of the U.P.C.H. Act in proper manner and dismissed the appeal in arbitrary manner. He next submitted that the revision filed against the

appellate order has also been dismissed illegally under the impugned order. He further submitted that the shop of the Chak allotted to the petitioner under the impugned order has been become 'L' shape, which is not fit for cultivation. He further submitted that in the impugned orders, it is wrongly mentioned that the Chak, which has been allotted to the petitioner by Consolidation Officer is rectangular in shape. He placed the 'Chak Map' of the village in order to demonstrate that the shape of the Chak of the petitioner has become 'L' shape and the same is not fit for cultivation. He submitted that petitioner has claimed the allotment of the Chak on plot nos. 536 and 539, which are the original holdings of the petitioner, as such the relief claimed by petitioner cannot be denied by the Settlement Officer Consolidation. He further submitted that the impugned appellate order and revisional orders are liable to be set aside and the matter be sent back before the appellate Court to decide the appeal afresh in accordance with law.

5. On the other hand, Sri V.K. Singh, learned Senior Counsel appearing for respondent nos. 5 to 7 submitted that petitioner has filed the Chak Objection claiming the allottment of plot in which his source of irrigation is situated and Consolidation Officer has allowed the claim of the petitioner, as such petitioner can not file appeal claiming further relief in the matter. He submitted that petitioner has not impleaded the necessary parties in the instant petition as well as before the Consolidation authorities, as such the writ petition filed by the petitioner cannot be entertained. He next submitted that petitioner's Chak is not effected in any manner by the Chak of respondent nos. 5 to 7. He further submitted that the schedule which is attached along with the order of Consolidation Officer fully demonstrates that petitioner's Chak/claim is not effected in any manner from the Chak of respondent nos. 5 to 7. He next submitted that it is not necessary that every original holdings be allotted to the tenure holder concerned in the alottment of the Chak proceedings. He submitted that Chak map annexed along with writ petition is not correct, as such no interference is required in the matter and the writ petition is liable to be dismissed.

6. Sri Ashutosh Kumar Rai, learned Additional Chief Standing Counsel for State submitted impugned orders have been passed considering the provision of U.P.C.H. Act, as such no interference is required in the matter.

7. I have considered the arguments advanced by the learned counsel for the parties and perused the record.

8. There is no dispute about the facts that Chak Objection filed by the petitioner was allowed, but Chak Appeal filed by the petitioner has been dismissed and the Chak revision filed by petitioners has also been dismissed under the impugned orders.

9. In order to appreciate the controversy involved in the matter, perusal of Section 19 of U.P.C.H. Act will be relevant which is as under:-

***"[19. Conditions to be fulfilled by a Consolidation Scheme. - (1) A Consolidation Scheme shall fulfill the following conditions, namely, -***

***(a) the rights and liabilities of a tenure-holder, as recorded in the register prepared under Section 10, are, subject to the deductions, if any, made on account of contributions to public purposes under***

***this Act, secured in the lands allotted to him;***

***(b) the valuation of plots allotted to a tenure-holder, subject to deductions, if any, made on account of contributions to public purposes under this Act is equal to the valuation of plots originally held by him:***

***Provided that, except with the permission of the Director of Consolidation, the area of the holding or holdings allotted to a tenure-holder shall not differ from the area of his original holding or holdings by more than twenty five per cent of the latter;***

***(c) the compensation determined under the provisions of this Act, or the rules framed thereunder, is awarded -***

***(1) to the tenure-holder -***

***(i) for trees, wells and other improvements, originally held by him and allotted to another tenure-holders, and***

***(ii) for land contributed by him for public purposes;***

***(2) to the Gaon Sabha, or any other local authority, as the case may be, for development, if any, effected by it in or over land belonging to it and allotted to a tenure-holder;***

***(d) the principles laid down in the Statement of Principles are followed;***

***(e) every tenure-holder is, as far as possible, allotted a compact area at the place where he holds the largest part of his holding :***

***Provided that no tenure-holder may be allotted more chaks than three, except with the approval in writing of the Deputy Director of Consolidation:***

***Provided further that no consolidation made shall be invalid for the reason merely that the number of chaks allotted to a tenure-holder exceeds three;***

***(f) every tenure-holder is, as far as possible, allotted the plot on which exists his private source of irrigation or any other improvement, together with an area in the vicinity equal to the valuation of the plots originally held by him there; and***

***(g) every tenure-holder is, as far as possible, allotted chaks in conformity with the process of rectangulation in rectangulation units.***

***(2) A Consolidation Scheme before it is made final under Section 23, shall be provisionally drawn up in accordance with the provisions of Section 19-A.]"***

10. Perusal of the C.H. Form 23 of the petitioner, contesting respondents provision of Section 19 of U.P.C.H. Act as well as the order passed by the Consolidation Officer in the Chak Objection filed by the petitioner fully demonstrate that petitioner has been adjusted on plot no. 496, in which his source of irrigation is situated, as such there is no illegality in allotment of the Chak to the petitioner by Consolidation Officer. Further, filing of Chak appeal by the petitioner claiming the allotment of Chak on his other original holdings cannot be allowed by the Consolidation Authorities. The appeal filed by the petitioner has rightly been dismissed and the revision has also been dismissed by the Deputy Director of Consolidation under Section 48 of the U.P.C.H. Act.

11. Law relating to allotment of Chak under U.P.C.H. Act is well settled that tenure holder be allotted Chak as far as possible on his original largest holding considering the source of irrigation of tenure holder copuled with the process of rectangulation of Chak of tenure holder which has been followed in the instant matter as far as possible.

12. Considering the entire facts an circumstances of the case, there is no scope of interference against the impugned orders passed by Consolidation Authorities in the Chak allotment proceedings.

13. The writ-petition is ***dismissed***.

14. No order as to costs.

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**(2024) 11 ILRA 215**
**APPELLATE JURISDICTION**
**CRIMINAL SIDE**
**DATED: LUCKNOW 12.11.2024**

**BEFORE**

**THE HON'BLE KRISHAN PAHAL, J.**

Criminal Misc. Bail Application No 1538 of 2023
Alongwith other connected cases

**Nandan Singh Bisht ...Appellant**
**Versus**
**State of U.P. ...Respondent**

**Counsel for the Appellant:**
Vaibhav Kalia, Vidhu Bhushan Kalia

**Counsel for the Respondent:**
G.A., Ajai Kumar, Vivek Kumar Rai

**Criminal Law - Indian Penal Code, 1860 - Sections 147, 148, 149, 307, 326, 302, 120-B, 34 & 427 - Arms Act, 1959 - Section 30 - The Motor Vehicle Act, 1988 - Section 177 - Code of Criminal Procedure, 1973 - Section 144 - Constitution of India, 1950 - Article 21 - Indian Evidence Act, 1872 - Section 9 - F.I.R. lodged with allegations that farmers and labours of local area were protesting peacefully, main accused reached on spot with four wheelers along with unknown persons armed with weapons - Said accused started firing and moving ahead at high speed, crushed crowd - Due to firearm injury, one person died on spot, some pedestrians received injuries - In said incident, four farmers died. (Para 19, 20)**

**Contention by applicants, they are not named in FIR, their name came up during investigation in statement of eye-witnesses - Cross-version to instant case was registered by co-accused with allegations that protestors attacked them - Postmortem report from side of accused persons, indicates cause of death was antemortem injuries received by blunt object, as they were beaten to death by farmers. (Para 21, 22, 23)**

**Case was later on modified from gunshot injuries to injuries caused due to crushing by vehicles - Out of 114 witnesses, only seven examined. (Para 26, 30)**

**Held, regarding criminal antecedents, it was not case of St.that applicants might adversely influence investigation or might intimidate witnesses - No exceptional circumstances shown to deny bail to accused, hence, bail on ground of criminal antecedent can't be deny. (Para 53)**

**Cross-version to present case, acknowledged by both parties - Main accused, granted bail by Supreme Court - Significant number of witnesses to be examined, no likelihood that trial will conclude in near future - Applicants have not misused interim bail previously granted. (Para 56)**

**Bail applications allowed.** (E-13)

**List of Cases cited:**

1. Upkar Singh Vs Ved Prakash & ors., (2004) 13 SCC 292, (Para 23, 24)

2. U.O.I.Vs K.A. Najeeb, AIR 2021 SC 712

3. Padam Singh Vs St. of U.P., (2000) 1 SCC 621, (Para 5)

4. Vijayee Singh Vs St. of U.P., (1990) 3 SCC 190

5. Nanha S/o Nabhan Kha Vs St. of U.P., (1992) SCC OnLine All 871, (Para 60)

6. Sanjay Chandra Vs C.B.I., (2012) 1 SCC 40, (Para 18)

7. Satender Kumar Antil Vs C.B.I. & anr.2022 INSC 690, (Para 94, 98)

8. Indrani Pratim Mukerjea Vs C.B.I. & anr.(2022) SCC OnLine SC 695

9. Javed Gulam Nabi Shaikh Vs St. of Mah. & anr.2024 SCC OnLine SC 1693

10. R.D. Upadhyay Vs St. of A.P. & ors., (1996) 3 SCC 422

11. Nikesh Tarachand Shah Vs U.O.I., (2018) 11 SCC 1, (Para 19, 24)

12. Manish Sisodia Vs Directorate of Enforcement, 2024 INSC 595

13. Prabhakar Tewari Vs St. of U.P. & anr. (2020) 11 SCC 648

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

1. The case has been heard through Video Conferencing from Allahabad.

2. Heard Sri Vaibhav Kalia (in bail no.1538/2023), Sri Salil Kumar Srivastava (in bail nos.11541/2022, 14110/2022, 14113/2022 & 14164/2022), Sri Manish Mani Sharma (in bail nos.1575/2023, 1640/2023, 1920/2023, 1998/2023, 2066/2023, 2090/2023 & 2316/2023), learned counsels for the applicants and Sri Ajai Kumar, Sri Vivek Kumar Rai, learned counsels for the informant as well as Ms. Parul Kant, learned A.G.A. for the State and perused the record.

**First Bail Applications Moved On Behalf Of The Applicants:-**

3. Applicant- Nandan Singh Bisht went to jail on 19.10.2021 in Case Crime No.0219 of 2021, under Sections 147, 148, 149, 307, 326, 302, 120-B, 34, 427 IPC, Section 30 of Arms Act and Section 177 of Motor Vehicle Act, Police Station- Tikuniya, District- Lakhimpur Kheri.

4. Applicant- Latif alias Kale went to jail on 13.10.2021 in Case Crime No.0219 of 2021, under Sections 147, 148, 149, 302, 120-B, 307, 326/34, 427/34 IPC, Section 30 of Arms Act and Section 177 of Motor Vehicle Act, Police Station- Tikuniya, District- Lakhimpur Kheri.

5. Applicant- Satyam Tripathi alias Satya Prakash Tripathi went to jail on 19.10.2021 in Case Crime No.0219 of 2021, under Sections 147, 148, 149, 302, 120-B, 307, 326/34, 427/34 IPC, Section 30 of Arms Act and Section 177 of Motor Vehicle Act, Police Station- Tikuniya, District- Lakhimpur Kheri.

6. Applicant- Shekhar Bharti went to jail on 12.10.2021 in Case Crime No.0219 of 2021, under Sections 147, 148, 149, 302, 120-B, 307, 326/34, 427/34 IPC, Section 30 Arms Act and Section 177 of Motor Vehicle Act, Police Station- Tikuniya, District- Lakhimpur Kheri.

7. Applicant- Dharmendra Singh Banjara went to jail on 18.10.2021 in Case Crime No.0219 of 2021, under Sections 147, 148, 149, 307, 326, 34, 302, 120-B, 427 IPC and Section 177 of Motor Vehicle Act, Police Station- Tikoniya, District- Lakhimpur Kheri.

8. Applicant- Ashish Pandey went to jail on 18.10.2021 in Case Crime No.0219 of 2021, under Sections 147, 148, 149, 307, 326, 34, 302, 120-B, 427 IPC and Section 177 of Motor Vehicle Act, Police Station- Tikoniya, District- Lakhimpur Kheri.

9. Applicant- Rinkoo Rana went to jail on 18.10.2021 in Case Crime No.0219 of 2021, under Sections 147, 148, 149, 307, 326, 34, 302, 120-B, 427 IPC and Section 177 of Motor Vehicle Act, Police Station- Tikoniya, District- Lakhimpur Kheri.

10. Applicant- Ullas Kumar Trivedi @ Mohit Trivedi went to jail on 18.10.2021 in Case Crime No.0219 of 2021, under Sections 147, 148, 149, 307, 326, 34, 302, 120-B, 427 IPC and Section 177 of Motor Vehicle Act, Police Station- Tikoniya, District- Lakhimpur Kheri.

**Second Bail Applications Moved On Behalf Of The Applicant:-**

11. Applicant- Ankit Das, went to jail on 13.10.2021 in Case Crime No.0219 of 2021, under Sections 147, 148, 149, 302, 120-B, 307, 326/34, 427 IPC, Section 30 of Arms Act and Section 177 of Motor Vehicles Act, Police Station- Tikuniya, District- Lakhimpur Kheri.

12. Applicant- Lavkush, went to jail on 18.10.2021 in Case Crime No.0219 of 2021, under Sections 147, 148, 149, 307, 326, 34, 302, 120-B & 427 of IPC and Section 177 of Motor Vehicles Act, Police Station- Tikuniya, District- Lakhimpur Kheri.

13. Applicant- Sumit Jaisawal went to jail on 18.10.2021 in Case Crime No.0219 of 2021, under Sections 147, 148, 149, 307, 326, 34, 302, 120-B, 427 of IPC, Sections 3/25 & 3/27 of Arms Act and Section 177 of Motor Vehicles Act, Police Station- Tikoniya, District- Lakhimpur Kheri.

14. Applicant- Shishupal went to jail on 18.10.2021 in Case Crime No.0219 of 2021, under Sections 147, 148, 149, 307, 326, 34, 302, 120-B, 427 of IPC and Section 177 of Motor Vehicles Act, Police Station- Tikoniya, District- Lakhimpur Kheri.

15. First bail applications of above mentioned four applicants, namely, Ankit Das, Lavkush, Sumit Jaisawal and Shishupal were rejected by a common order dated 09.05.2022 passed by the coordinate Bench of this Court in Criminal Misc. Bail Application No. 2986 of 2022.

16. In the instant application, the applicants, namely, Nandan Singh Bisht, Latif alias Kale, Satyam Tripathi alias Satya Prakash Tripathi, Shekhar Bharti, Ashish Pandey, Rinkoo Rana, Ankit Das and Sumit Jaisawal were granted interim bail by a common order dated 14.02.2023 passed by the coordinate Bench of this Court.

17. So far as the other applicants, namely, Dharmendra Singh Banjara, Ullas Kumar Trivedi @ Mohit Trivedi and Lavkush are concerned, interim bail were granted to them vide orders dated 28.02.2023 passed in respective bail applications. The applicant, namely, Shishupal was granted interim bail vide order dated 20.03.2023.

18. Since all the aforesaid bail applications are relating to the same crime (FIR), therefore, they are being disposed of by a common order.

**PROSECUTION STORY:**

19. As per FIR, named accused Ashish Mishra @ Monu in his Thar Mahindra vehicle followed by two other vehicles, came to the place of incident at a

high speed and killed the farmers by firing at them indiscriminately.

20. On the written complaint of Jagjeet Singh s/o Hari Singh, the F.I.R. was lodged with the allegations that on 3rd October, 2021, farmers and labours of the local area were protesting peacefully at Agrasen Inter College Play Ground, Tikuniya, Kheri for showing the black flag to State Home Minister, Government of India, Mr. Ajay Mishra "Teny' and Deputy Chief Minister Mr. Keshav Prasad Maurya, Government of U.P. It is further alleged in the F.I.R. that at about 3 p.m., accused Ashish Mishra @ Monu reached on the spot with 3-4 vehicles (four wheelers) along with 15-20 unknown persons armed with weapons. Ashish Mishra @ Monu, who was sitting on the left side in the Thar Mahindra vehicle, started firing and the vehicle, which was moving ahead at a high speed, crushed the crowd. Further allegation made in the F.I.R. is that due to firearm injury, one Gurvinder Singh s/o Sukhvinder Singh died on the spot. Thereafter, the two vehicles including the vehicle of accused Ashish Mishra @ Monu overturned in the side ditch of the road, as a result, some pedestrians also received injuries. Thereafter, Ashish Mishra @ Monu ran away from the spot by taking the cover of his firing. In the said incident, four farmers died, namely, (i) Gurvinder Singh s/o Sukhvinder Singh r/o Motronia, Nanpara, (ii) Daljeet Singh s/o Hari Singh r/o Village Banjara Tanda, Nanpara, (iii) Nakshatra Singh s/o Sukkha Singh r/o Village Nandapurva Dhaurahara, Tehsil Kheri and (iv) Lavpreet Singh s/o Satnam Singh r/o Chaukhadafarm Palia Kalan, Kheri.

**ARGUMENTS ON BEHALF OF APPLICANT:**

21. The applicants are not named in the FIR. The names of the applicants have come up later on during the course of investigation in the statement of eye-witnesses.

22. There is a cross-version to the instant case which was registered as FIR No.220 of 2021 by accused Sumit Jaiswal with the allegations that it were the protestors who had attacked them and committed murder of Hari Om Mishra, Shubham Mishra and Shyam Sundar and grievously injured three others.

23. The postmortem report of the deceased persons from the side of accused persons, namely, Hari Om Mishra, Shubham Mishra and Shyam Sundar, categorically indicates that the cause of death was antemortem injuries received by hard and blunt object, as such they were beaten to death by the farmers.

24. The FIR does not mention the fact of aforesaid murder of three persons in the instant FIR No.219 of 2021. The absence of mentioning the factum of murder of three persons and injuring equal number of persons from the side of applicants goes against the prosecution story.

25. It is true that four persons from the side of informant have lost their lives coupled by the fact that an independent person who was a journalist has also been put to death in the instant case, but it is an admitted fact that three persons from the side of applicants have also died, as such, at this point of time it cannot be ascertained as to which party was the aggressor one.

26. The prosecution has not come with clean hands as the case was later on

modified from being that of gunshot injuries to that of injuries caused due to crushing by vehicles. It is possible that the driver might have panicked due to rage of the public at large. The case is of mob lynching and there was so hue and cry at the place of occurrence that there was no chance of anybody hearing the accused Ashish Mishra @ Monu saying "teach them a lesson", as such, their statements cannot be relied upon. No overt act has been assigned individually to the applicants.

27. One Punto car from the side of applicants was also ransacked by the protestors with an ulterior motive which shows their defiance of law and also the fact that it has not been explained as to how the said car was damaged.

28. The provisions of Section 144 Cr.P.C. were applicable to both the parties, as such, the procession of farmers cannot be termed to be peaceful.

29. The FIR was instituted under several sections along with sections 279, 338 and 304-A I.P.C., but the said sections have been deleted later on by the Investigating Agency with the permission of C.J.M. concerned, which implies that the vehicles were being driven at a normal speed.

30. The trial is moving at a snail's pace as out of a list of 114 witnesses, only seven have been examined so far. There is no likelihood of conclusion of trial in near future. The fundamental rights of the applicants enshrined under Article 21 of the Constitution of India stand violated as the applicants were incarcerated in jail for more than one year.

31. The defence is not required to prove its version beyond reasonable doubt but has to adduce evidence which has to be seen by the Courts on preponderance and probabilities. Thus, there is every possibility that the driver of the vehicles might have panicked and crashed, thereby causing death of four persons from the side of protesters and a journalist.

32. Much reliance has been made on the bail order of the main accused person Ashish Misha @ Monu who was earlier on enlarged on interim bail by the Supreme Court and the same order was made absolute vide order dated 22.7.20241, which reads as under:-

> *"1. The petitioner was granted interim regular bail vide an order dated 25.01.2023 subject to various conditions including that he shall not stay in the State of Uttar Pradesh or in NCT of Delhi during the period of interim bail. Other usual conditions were also imposed upon the petitioner. Subsequently, the condition of not staying in NCT of Delhi was relaxed vide an order dated 26.09.2023 taking into consideration the ailment of the petitioner's mother and the fact that he was also required to get his daughter operated in Delhi.*
>
> *2. During the course of hearing, it is stated by Mr. Siddharth Dave, learned Senior Counsel for the petitioner that there is a change of circumstances since the petitioner's father is no longer an elected Member of Parliament or a Minister in the Union Government. There is no residential accommodation available to the petitioner or his family to stay in Delhi. He,*

*accordingly, seeks further modification of the condition imposed in the order dated 25.01.2023.*

*3. We have heard Mr. Prashant Bhushan, learned counsel for the complainant/farmers with reference to the prayer made by the petitioner.*

*4. Taking into consideration all the attending circumstances, the interim bail granted to the petitioner vide order dated 25.01.2023 is made absolute subject to the following conditions:*

*(i) The petitioner is permitted to stay either in NCT of Delhi or in Lucknow city in the State of Uttar Pradesh.*

*(ii) The petitioner shall, however, abide by the terms and conditions imposed vide order dated 25.01.2023 and shall be entitled to go to the place where the trial is pending a day prior to the date fixed in the trial case.*

*5. Similarly, the interim bail granted to Guruwinder Singh, S/o Gurmej Singh; Kamaljeet Singh, S/o Iqbal Singh, Gurupreet Singh, S/o Kulwinder Singh and Vichitra Singh, S/o Lakhwinder Singh, in FIR No.220 of 2021 is also made absolute.*

*6. Adverting to the main case, we are informed by Ms.Garima Prashad, Sr.Additional Advocate General for the State of U.P. that out of 114 witnesses, 7 have been examined so far. In our considered view, the trial proceedings are required to be expedited. This can only be ensured provided that (i) the Trial Court fixes a schedule for conducting the trial; (ii) the witnesses to be examined on the fixed date are identified in advance; (iii) necessary directions are issued to the prosecution/State Authorities to ensure the presence of those witnesses; and (iv) counsel for the parties extend full cooperation to the trial in examining/cross-examining the witnesses.*

*7. We, accordingly, direct the learned Trial Court to fix a schedule, keeping in view the pendency of other important or time-bound matters in the said Court, however, prioritising the subject trial. The Public Prosecutor shall inform the Trial Court the number of witnesses (five witnesses or so for one day), who shall be produced on the date fixed. The State Authorities shall also ensure their presence before the Trial Court on the date fixed. Counsel for the petitioner or those representing other co-accused shall extend full cooperation to the Trial Court in this regard.*

*8. The Trial Court shall send a Status Report to this Court before the next date of hearing.*

*9. Post the matter for hearing on 30.09.2024."*

33. Thus, there is no likelihood of the conclusion of trial in near future, as such the applicants are entitled for bail.

34. The applicants have right of private defence as contemplated under Section 97/103 I.P.C. as three persons from the side of applicants have also been put to death and three others have sustained grievous injuries.

35. No test identification parade was conducted as per the provisions of Section 9 of the Indian Evidence Act, thus nominating the accused persons is politically motivated.

36. The applicants have not misused the interim bail granted earlier on, as such, there is no likelihood of them misusing the bail and are not at all a "*flight risk*".

**ARGUMENTS ON BEHALF OF OPPOSITE PARTY:**

37. The bail application has been opposed on the ground that five innocent persons have been put to death by the applicants and named accused person Ashish Mishra @ Monu. The eye-witnesses have nominated the applicants, as such they are not entitled for bail.

38. It is not disputed that criminal history of the applicants has been explained.

**ARGUMENTS ON BEHALF OF STATE:**

39. Learned A.G.A. has also opposed the bail application on the ground that the argument advanced on behalf of applicants that no one sustained any gunshot injury carries no weight as the informant is not an eye-witness to the incident. It is settled law established by the Supreme Court that FIR is not an encyclopedia of events. The applicants have been identified by all the other eye-witnesses.

40. The fact that the criminal history of the applicants has been explained and also that they have not misused the liberty of bail is also not disputed.

**CASE LAW:**

41. The Full Bench of Supreme Court in the case of ***Upkar Singh vs. Ved Prakash & others***[2] has observed in paragraphs 23 & 24 as follows:

> *"23. Be that as it may, if the law laid down by this Court in T.T. Antony case is to be accepted as holding that a second complaint in regard to the same incident filed as a counter-complaint is prohibited under the Code then, in our opinion, such conclusion would lead to serious consequences. This will be clear from the hypothetical example given hereinbelow i.e. if in regard to a crime committed by the real accused he takes the first opportunity to lodge a false complaint and the same is registered by the jurisdictional police then the aggrieved victim of such crime will be precluded from lodging a complaint giving his version of the incident in question, consequently he will be deprived of his legitimated right to bring the real accused to books. This cannot be the purport of the Code.*
>
> *24. We have already noticed that in the T.T. Antony case this Court did not consider the legal right of an aggrieved person to file counterclaim, on the contrary from the observations found in the said judgment it clearly indicates that filing a counter-complaint is permissible."*

42. The Supreme Court in the case of ***Union of India vs. K.A. Najeeb***[3] has observed as under:-

> *"We are conscious of the fact that the charges levelled against the respondent are grave and a serious threat to societal harmony. Had it been a case at the threshold, we would have outrightly turned down the respondent's prayer. However, keeping in mind the length of the period spent by him in custody and the unlikelihood of the trial being completed anytime soon, the High Court appears to have been left with no other option except to grant bail."*

43. The Supreme Court in ***Padam Singh vs. State of U.P.***[4] has held:

> *"5. ....when the prosecution does not explain the injury sustained by the accused at about the time of the occurrence or in the course of occurrence, the court can draw the inference that the prosecution has suppressed the genesis and origin of the occurrence and has thus, not presented the true version. It is also well settled that where the evidence consists of interested or inimical witnesses, then, non-explanation of the injury on the accused by the prosecution assume greater importance....."*

44. The Supreme Court in ***Vijayee Singh vs. State of U.P.***[5] has held:

> *10. It was further observed that:*
>
> *"... in a murder case, the non-explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important circumstance from which the court can draw the following inferences:*
>
> *(1) that the prosecution has suppressed the genesis and the origin of the occurrence and has thus* not presented the true version;
>
> *(2) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable.*
>
> *(3) that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case."*

45. This Court in the case of ***Nanha S/o Nabhan Kha vs. State of U.P.***[6] has observed as follows:

> *"60. As regards the second part of the referred question whether it is duty of the co-accused to disclose in his bail application the fact that on an earlier occasion the bail application of another co-accused in the same case has been rejected. The prior rejection of the bail application of one of the accused cannot preclude the court from granting bail to another accused whose case has not been considered at the earlier occasion. The accused who comes up with the prayer for bail and who had no opportunity of being heard or*

*placing material before the Court at the time when the bail of another accused was heard and rejected, cannot be prejudiced in any other manner by such rejection."*

46. In the case of ***Sanjay Chandra vs. Central Bureau of Investigation***[7], the Supreme Court has held:

*"18. In his reply, Shri. Jethmalani would submit that as the presumption of innocence is the privilege of every accused, there is also a presumption that the appellants would not tamper with the witnesses if they are enlarged on bail, especially in the facts of the case, where the appellants have cooperated with the investigation. In recapitulating his submissions, the learned senior counsel contended that there are two principles for the grant of bail - firstly, if there is no prima facie case, and secondly, even if there is a prima facie case, if there is no reasonable apprehension of tampering with the witnesses or evidence or absconding from the trial, the accused are entitled to grant of bail pending trial. He would submit that since both the conditions are satisfied in this case, the appellants should be granted bail.*

*xxxxx*

47. In the case of ***Satender Kumar Antil vs. Central Bureau of Investigation and another***[8], the Supreme Court has laid down as follows:

*"94. Criminal courts in general with the trial court in particular are the guardian angels of liberty. Liberty, as embedded in the Code, has to be preserved, protected, and enforced by the criminal courts. Any conscious failure by the criminal courts would constitute an affront to liberty. It is the pious duty of the criminal court to zealously guard and keep a consistent vision in safeguarding the constitutional values and ethos. A criminal court must uphold the constitutional thrust with responsibility mandated on them by acting akin to a high priest.*

*xxxxxx*

*"98. Uniformity and certainty in the decisions of the court are the foundations of judicial dispensation. Persons accused with same offence shall never be treated differently either by the same court or by the same or different courts. Such an action though by an exercise of discretion despite being a judicial one would be a grave affront to Articles 14 and 15 of the Constitution of India."*

48. The Supreme Court in its judgment passed in ***Indrani Pratim Mukerjea vs. Central Bureau of Investigation and Another***[9] has granted bail to the accused as the trial was unlikely to be concluded in near future due to huge witnesses remaining to be testified. The same view has been expressed by the Supreme Court in the judgment of ***Javed Gulam Nabi Shaikh vs. State of Maharashtra and Another***[10].

49. Vide its judgment dated 19.3.1996 passed in ***R.D. Upadhyay vs. State of A.P. and Others***[11] taking into

consideration the right to speedy trial of the accused, the under trials languishing in several jails were ordered to be released who were incarcerated for a period of one year or more.

50. The principle that bail is the rule and jail an exception has been emphasised in the judgment of the Supreme Court passed in ***Nikesh Tarachand Shah vs. Union of India***[12]. The relevant paragraphs are being reproduced as follows:

> *19. In Gurbaksh Singh Sibbia v. State of Punjab [Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565 : 1980 SCC (Cri) 465], the purpose of granting bail is set out with great felicity as follows: (SCC pp. 586-88, paras 27-30)*
>
> *"27. It is not necessary to refer to decisions which deal with the right to ordinary bail because that right does not furnish an exact parallel to the right to anticipatory bail. It is, however, interesting that as long back as in 1924 it was held by the High Court of Calcutta in Nagendra Nath Chakravarti, In re [Nagendra Nath Chakravarti, In re, 1923 SCC OnLine Cal 318 : AIR 1924 Cal 476 : 1924 Cri LJ 732] , AIR pp. 479-80 that the object of bail is to secure the attendance of the accused at the trial, that the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial and that it is indisputable that bail is not to be withheld as a punishment. In two other cases which, significantly, are the "Meerut Conspiracy cases" observations are to be found regarding the right to bail which deserve a special mention. In K.N. Joglekar v. Emperor [K.N. Joglekar v. Emperor, 1931 SCC OnLine All 60 : AIR 1931 All 504 : 1932 Cri LJ 94] it was observed, while dealing with Section 498 which corresponds to the present Section 439 of the Code, that it conferred upon the Sessions Judge or the High Court wide powers to grant bail which were not handicapped by the restrictions in the preceding Section 497 which corresponds to the present Section 437. It was observed by the Court that there was no hard-and-fast rule and no inflexible principle governing the exercise of the discretion conferred by Section 498 and that the only principle which was established was that the discretion should be exercised judiciously. In Emperor v. H.L. Hutchinson [Emperor v. H.L. Hutchinson, 1931 SCC OnLine All 14 : AIR 1931 All 356 : 1931 Cri LJ 1271], AIR p. 358 it was said that it was very unwise to make an attempt to lay down any particular rules which will bind the High Court, having regard to the fact that the legislature itself left the discretion of the court unfettered. According to the High Court, the variety of cases that may arise from time to time cannot be safely classified and it is dangerous to make an attempt to classify the cases and to say that in particular classes a bail may be granted but not in other classes. It was observed that the principle to be*

*deduced from the various sections in the Criminal Procedure Code was that grant of bail is the rule and refusal is the exception. An accused person who enjoys freedom is in a much better position to look after his case and to properly defend himself than if he were in custody. As a presumably innocent person he is therefore entitled to freedom and every opportunity to look after his own case. A presumably innocent person must have his freedom to enable him to establish his innocence.*

*28. Coming nearer home, it was observed by Krishna Iyer, J., in Gudikanti Narasimhulu v. State [Gudikanti Narasimhulu v. State, (1978) 1 SCC 240 : 1978 SCC (Cri) 115] that: (SCC p. 242, para 1)*

*'1. ... the issue [of bail] is one of liberty, justice, public safety and burden of the public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitised judicial process. ... After all, personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in terms of "procedure established by law". The last four words of Article 21 are the life of that human right.'*

*29. In Gurcharan Singh v. State (UT of Delhi) [Gurcharan Singh v. State (UT of Delhi), (1978) 1 SCC 118 : 1978 SCC (Cri) 41] it was observed by Goswami, J., who spoke for the Court, that: (SCC p. 129, para 29)*

*'29. ... There cannot be an inexorable formula in the matter of granting bail. The facts and circumstances of each case will govern the exercise of judicial discretion in granting or cancelling bail.'*

*30. In American Jurisprudence (2nd, Vol. 8, p. 806, para 39), it is stated:*

*'Where the granting of bail lies within the discretion of the court, the granting or denial is regulated, to a large extent, by the facts and circumstances of each particular case. Since the object of the detention or imprisonment of the accused is to secure his appearance and submission to the jurisdiction and the judgment of the court, the primary inquiry is whether a recognizance or bond would effect that end.'*

*It is thus clear that the question whether to grant bail or not depends for its answer upon a variety of circumstances, the cumulative effect of which must enter into the judicial verdict. Any one single circumstance cannot be treated as of universal validity or as necessarily justifying the grant or refusal of bail."*

*xxxx*

*24. Article 21 is the Ark of the Covenant so far as the Fundamental Rights Chapter of the Constitution is concerned. It deals with nothing less sacrosanct than the rights of life and personal liberty of the citizens of India and other persons. It is the only article in the Fundamental Rights Chapter (along with Article 20) that cannot be suspended even in an emergency [see Article 359(1) of the Constitution]. At present, Article 21*

*is the repository of a vast number of substantive and procedural rights post Maneka Gandhi v. Union of India [Maneka Gandhi v. Union of India, (1978) 1 SCC 248]* .

51. Reiterating the aforesaid view the Supreme Court in the case of ***Manish Sisodia Vs. Directorate of Enforcement***[13] has again emphasised that the very well-settled principle of law that bail is not to be withheld as a punishment is not to be forgotten. It is high time that the Courts should recognize the principle that "bail is a rule and jail is an exception".

52. In the case of ***Prabhakar Tewari Vs. State of U.P. and another***[14], the Supreme Court has observed that pendency of several criminal cases against an accused by itself cannot be a basis for refusal of bail.

**CONCLUSION:**

53. In so far as criminal antecedents of the applicants are concerned, it is not the case of the State that applicants might tamper with or otherwise adversely influence the investigation, or that they might intimidate witnesses before or during the trial. The State has also not placed any material that applicants in past attempted to evade the process of law. If the accused is otherwise found to be entitled to bail, he cannot be denied bail only on the ground of criminal history, no exceptional circumstances on the basis of criminal antecedents have been shown to deny bail to accused, hence, the Court does not feel it proper to deny bail to the applicants just on the ground of criminal antecedent. The instant case falls within the parameters of ***Prabhakar Tiwari (supra).***

54. It is an admitted fact that both the parties did not observe restraint, which led to unfortunate death of eight persons. As per the arguments tendered by both the parties, five persons (four farmers and one journalist) from the side of the first informant/victim are said to have died in the incident, and three persons are said to have been put to death from the side of the applicant. In addition to it, 13 persons sustained injuries from the side of informant and 3 from the side of applicant.

55. It is settled principle of law that the object of bail is to secure the attendance of the accused at the trial. No material particulars or circumstances suggestive of the applicant fleeing from justice or thwarting the course of justice or creating other troubles in the shape of repeating offences or intimidating witnesses and the like have been shown by learned AGA or the counsel for informant.

56. In light of the circumstances and the following considerations:

(i). There is cross-version to the present case, acknowledged by both parties;

(ii). The Supreme Court has made absolute the interim bail granted to four accused persons in the cross-version;

(iii) The main accused, Ashish Mishra @ Monu, named in the F.I.R., was granted bail by the Supreme Court on 22.07.2024. The applicants' case is at a better footing than his, as they were not named in the F.I.R.;

(iv) A significant number of witnesses remain to be examined, and there is no likelihood that the trial will conclude in the near future;

(v) There is no indication that the applicants have misused the interim bail previously granted;

(vi) The applicants' antecedents have been sufficiently explained.

The Court finds it to be a fit case for bail. Accordingly, the bail applications are hereby allowed.

57. Let the applicants- **Nandan Singh Bisht, Latif Alias Kale, Satyam Tripathi Alias Satya Prakash Tripathi, Shekhar Bharti, Dharmendra Singh Banjara, Ashish Pandey, Rinkoo Rana, Ullas Kumar Trivedi Alias Mohit Trivedi, Ankit Das, Lavkush, Sumit Jaisawal** and **Shishupal** involved in aforementioned case crime number be released on bail on furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned subject to following conditions.

(i) The applicants shall not tamper with evidence.

(ii) The applicants shall remain present, in person, before the Trial Court on dates fixed for (1) opening of the case, (2) framing of charge and (3) recording of statement under Section 313 Cr.P.C. If in the opinion of the Trial Court absence of the applicants is deliberate or without sufficient cause, then it shall be open for the Trial Court to treat such default as abuse of liberty of bail and proceed against them in accordance with law.

58. In case of breach of any of the above conditions, it shall be a ground for cancellation of bail. Identity, status and residence proof of the applicants and sureties be verified by the court concerned before the bonds are accepted.

59. It is made clear that observations made in granting bail to the applicants shall not in any way affect the learned trial Judge in forming his independent opinion based on the testimony of the witnesses.

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**(2024) 11 ILRA 227**
**APPELLATE JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 08.11.2024**

**BEFORE**

**THE HON'BLE VIKRAM D. CHAUHAN, J.**

Criminal Misc. Anticipatory Bail Application Nos 6849 of 2024, 6901 of 2024, 6946 of 2024 & 7113 of 2024
(U/s 438 Cr.P.C.)

**Mukesh & Ors. ...Appellants**
**Versus**
**State of U.P. ...Respondent**

**Counsel for the Appellants:**
Sri Girijesh Kumar Gupta, Sri Shiv Shankar Pd. Gupta, Sri Sunil Kumar

**Counsel for the Respondent:**
G.A., Sri Naveen Kumar Srivastava

**Criminal Law- The Code of Criminal Procedure,1973 - Section 438-** Power of anticipatory bail is somewhat extraordinary in character and it is to be exercised only in exceptional cases where the person is falsely implicated. Though in many cases it was held that bail is said to be a rule, it cannot, by any stretch of imagination, be said that anticipatory

bail is the rule--- Where from the material and allegation against an accused, offence is made out, the accused is required to show exceptional circumstances warranting the protection of liberty--- The Court is required to exercise jurisdiction of anticipatory bail on sound judicial principles. The court should be slow to grant anticipatory bail to an accused who does not abide by law and commits an offence--- No extraordinary circumstances have been shown by applicants that refusal to grant anticipatory bail would lead to injustice.

**Anticipatory bail applications lack merit and are accordingly dismissed**. (E-15)

**List of Cases cited:**

1. Sabita Paul Vs St. of W.B., 2024 INSC 245

2. Shrikant Upadhyay & ors. Vs St. of Bihar & anr., 2024 INSC 202

(Delivered by Hon'ble Vikram D. Chauhan, J.)

1. Heard Sri Sunil Kumar and Sri Girijesh Kumar Gupta, learned counsels for the applicants and Sri Naveen Kumar Srivastava, learned counsels for the informant, as well as, Sri Om Prakash Dwivedi, learned A.G.A. for the State.

2. All the four anticipatory bail applications are heard together with the consent of learned counsels for the respective parties and are being decided by a common judgment and order.

3. Present Anticipatory Bail Applications are preferred with the common prayer to grant anticipatory bail to applicants – **Mukesh s/o Buddhu, Nitin s/o Raju, Tusar s/o Sripal, Shiva s/o Sripal, Tusar @ Tushar Tomar s/o Mukesh @ Mukesh Tomar, Amit @ Dhoni @ Amit Tomar s/o Surendra @ Surendra Singh, Vikas s/o Mukesh, Umesh s/o Deshpal, Deepak s/o Munipal, Sonu s/o Satveer, Kapil s/o Ompal, Rahul s/o Chandar @ Chandrapal Singh and Ashish @ Deepak s/o Surendra (13 in number)** in Case Crime No. 0206 of 2024 under Sections 147, 148, 149, 452, 352, 307, 323, 325, 324, 504, 506, 427 I.P.C., Police Station – Pilkhua, District - Hapur.

4. It is submitted by learned counsels for applicants that FIR was lodged on 22.04.2024 at 1701 hours in respect of an incident of 21/22.04.2024 with the allegation that a dispute had arisen on 21.04.2024 between children and that was resolved, however, nominated accused persons have later on come near the house of informant and when informant along with family members reached near their house in mid night at about 1:00 PM (in the intervening night of 21.04.2024 & 22.04.2024), accused persons have assaulted the informant & family members and have fired & assaulted, as a result of same, injured have suffered injuries including firearm injury.

5. Learned counsel for applicants submits that general allegations of assault are made against nominated accused persons except against Tusar, Amit @ Dhoni, Ashish and Rahul against whom allegations of firing have been made. Learned counsels for applicants submits that 11 persons have suffered injuries in alleged occurrence out of which injury of three injured is grievous in nature. Injured, who have suffered grievous injuries are, namely, Keshav, Ankit and Shiva. Injury report of injured-Keshav is at page-27 of compliance affidavit dated 02.09.2024, where injured has received single gun shot injury on right arm. Learned counsels for applicants submits that insofar as, injury of injured-Ankit is concerned, which is at page-30 of compliance affidavit, he has

also suffered single gun shot injury at left thigh. Insofar as, injury of injured-Shiva is concerned, there are superficial abrasion on right cheek and has not suffered any gun shot injury. Learned counsels for applicants by referring to page-60 of compliance affidavit submits that injured-Ankur has suffered grievous injuries, however, as per NCCT report, which is at page-34 of compliance affidavit, there are no bony injury found.

6. Learned counsels for applicants further submit that two persons have suffered gun shot injuries, which is on non-vital part of the body. By referring to statement of injured, which is at page-19 of counter affidavit, learned counsels for applicants submit that general allegations with regard to assault have been made against accused persons. The injured has stated that it was a night incident and many persons were present at the place and he had only seen persons standing at the place of occurrence. Learned counsel for applicants further submits that eye-witness-Aman has also given the similar account. On the strength of the aforesaid statement, learned counsels for applicants submit that there are no allegation that applicant-Tusar had fired, his parentage is also not being disclosed in the statement of witnesses, as such it is not identifiable, as to who, is the author of gun shot injury.

7. Learned counsels for applicants further submit that applicants have no previous criminal history and a simple quarrel between two groups have resulted into present FIR and as such, present case is indicative of over implication. Learned counsels for applicants submit that in the facts and circumstances of the case, Section 149 IPC would not be attracted. Learned counsels for applicants further submits that there is delay in lodging of FIR. If applicants are enlarged on anticipatory bail, they will not misuse the liberty and cooperate with investigation. The applicants have apprehension of their arrest by police any time.

8. Sri Naveen Srivastava, advocate appearing on behalf of informant submitted that 11 persons have suffered injuries in assault, out of which, two have suffered gunshot injuries and one has suffered injury which is grievous in nature, as per medical report.

9. It is submitted by learned counsel for informant that in present case, occurrence has taken place adjacent to house of informant, when informant came back to his house from marriage ceremony. The nominated accused persons were waiting for informant and family members. When the informant reached near his house, nominated accused have assaulted them, as such in the medical report, it has been referred to as group fighting.

10. Learned counsel for informant further submit that in the present case section 149 I.P.C. would be attracted as there was no occasion for the applicants to have reached house of informant in mid of night. Learned counsel for informant further submits that there are two eye-witness account of alleged occurrence and injured themselves have supported the prosecution story and as such complicity of applicants cannot be denied. It is submitted by learned counsel for informant that eye-witness has come at later stage as can be seen from their statement. He submits that statement of injured itself is sufficient to prosecute the applicants.

11. Learned A.G.A. for State has submitted that in the present case there are

gunshot injuries of two injured persons. The incident has taken place at mid of night when accused/applicants along with other accused persons have come to house of informant and have assaulted. He submits that section 149 IPC would be attracted in the facts and circumstances of the present case. No person has suffered injuries on the side of the applicants, which is indicative of the fact that it was a one sided assault.

12. It is submitted by learned A.G.A. that it cannot be denied that gunshot injury received by two injured are itself enough to prosecute the applicants under section 307 IPC. It is further submitted by learned A.G.A. that pallets have been recovered on 22.04.2024. The recovery memo is at page-68 of the compliance affidavit.

13. The prosecution case as per first information report is to the effect that on 21.01.2024, marriage of one Arun (who is the family member of informant) was solemnized and informant & family members had gone to Village – Tatarpur, District – Gautambudh Nagar. Where there was a dispute between two children and same was intervened & the dispute was put to peace. On 21/22.04.2024 at about 01:00 o'clock in the night, informant, his brother Ajai Tomar, son of informant Vishal, Vikas, Rahul, Devendra, Keshav, Shiva, Sachin were coming back from marriage and as soon as aforesaid persons alighted from their vehicle, nominated accused persons started assaulting them with stick, farsa, gadansa, balkati, iron rod, bricks and firearm. The aforesaid accused persons were identified in the street-light. Accused-Tushar, Amit @ Dhoni, Ashish and Rahul fired with intention to commit culpable homicide. Injured-Keshav suffered firearm injury on the hand and was unconscious on the spot and other accused persons have assaulted as a result of the same, hand of injured-Ajai Tomar was fractured and there was injury on the head. Injured-Vishal was assaulted with sharp edged weapon and he sustained injury. Injured-Shiva was assaulted with iron pipe on his face, injured-Sachin received injury on his ear and others also received injury. The motorcycle of the informant was also damaged. When injured persons including informant in order to save themselves entered into their house, accused person armed with weapons also entered into the house and have abused, assaulted and when the villagers came, they ran away. When informant went to police, the police got conducted the medical examination of injured and the injured-Ajay Tomar, Vishal and Vikas were admitted to the hospital. The cover of bullet was also found at the place of occurrence which was handed over to police.

14. Injured–Devendra was medically examined on 22.04.2024 at Community Health Centre, Pilkhuwa, District–Hapur. As per the aforesaid medical report the following injuries were sustained by the aforesaid injured :-

*1.Multiple Abrasion 5cm x 4cm on left shoulder, 2. Contused abrasion of size 10cm x cm on left ankle and foot.*

15. Injured–Vijay was medically examined on 22.04.2024 at Community Health Centre, Pilkhuwa, District–Hapur. As per the aforesaid medical report the following injuries were sustained by the aforesaid injured :-

*i. lacerated wound of size 1cm x 1cm on left side frontal area*

*of scalp 9cm above left eyebrow; ii. Contusion below left eye of size 6cm x 5cm on left side of face; iii. Abrasion on chin of size 2cm x 2cm; iv. Contusion on right index finger of size 1cm x 1cm;*

16. Injured–Rahul was medically examined on 22.04.2024 at Community Health Centre, Pilkhuwa, District–Hapur. As per the aforesaid medical report the following injuries were sustained by the aforesaid injured :-

*i. lacerated wound on dorsom of right wrist of size 2cm x 0.5cm skin deep; ii. Contusion over right proximal forearm of size 1cm x 2cm; iii. Contusion over right distal arm; iv. Contusion of size 8cm x 3cm over left shoulder;*

17. Injured–Ajay was medically examined on 22.04.2024 at Community Health Centre, Pilkhuwa, District–Hapur. As per the aforesaid medical report the following injuries were sustained by the aforesaid injured :-

*i. two lacerated wound over left parietal occipital area of size 2cm x 1cm into skin deep;*

18. As per supplementary report of injured–Ajay which is at page-37 of compliance affidavit, hematoma along left fronto parieto temporal convexity and right shoulder dislocation was found which was grievous in nature.

19. Injured–Vishal was medically examined on 22.04.2024 at Community Health Centre, Pilkhuwa, District–Hapur. As per the aforesaid medical report the following injuries were sustained by the aforesaid injured :-

*i. incised wound on frontal area of scalp of size 6cm x 1cm skin deep; ii. Swelling over right forearm with tenderness;*

20. As per supplementary report of injured–Vishal at page-40 of Compliance Affidavit, hematoma along right high parietal convexity, undisplaced fracture of postero lateral wall of right maxillary sinus which are grievous in nature.

21. Injured–Vikas was medically examined on 22.04.2024 at Community Health Centre, Pilkhuwa, District–Hapur. As per the aforesaid medical report the following injuries were sustained by the aforesaid injured :-

*i. lacerated wound on left temporal tempo parietal area of scalp of size 3.5cm x 0.5cm into skin deep; ii. tenderness over left side lower back and left flank; iii. Abrasion over right arm of size 6cm x 1cm; iv. redness and tenderness over proximal forearm;*

22. As per supplementary report of injured–Vikas which is at page-43 of compliance affidavit, injury was non-grievous in nature.

23. Injured–Ankur was medically examined on 22.04.2024 at Rama Super Speciality Hospital & Research Centre. As per the aforesaid medical report the following injuries were sustained by the aforesaid injured :-

*i. lacerated wound on head of size 5cm x 1cm; ii. Abrasion on right wrist; iii. Abrasion on right knee;*

24. Injured–Keshav was medically examined on 22.04.2024 at Rama Super Speciality Hospital & Research Centre. As per the aforesaid medical report the following injuries were sustained by the aforesaid injured :-

*i. Gunshot wound 1.5cm x 1cm over anterior aspect in right arm and on posterior aspect 2cm x 1cm;*

25. As per supplementary report of injured–Keshav at page-35 of compliance affidavit firearm injury on right hand was found which was grievous in nature.

26. Injured–Aakash Tomar was medically examined on 22.04.2024 at Rama Super Speciality Hospital & Research Centre. As per the aforesaid medical report the following injuries were sustained by the aforesaid injured :-

*i. Lacerated wound on forehead 4cm x 1cm in right side;*

27. Injured–Ankit was medically examined on 22.04.2024 at Rama Super Speciality Hospital & Research Centre. As per the aforesaid medical report the following injuries were sustained by the aforesaid injured :-

*i. Gunshot wound at left thigh approx. diameter 1cm;*

28. Injured–Shiva was medically examined on 22.04.2024 at Rama Super Speciality Hospital & Research Centre. As per the aforesaid medical report the following injuries were sustained by the aforesaid injured :-

i. Superficial abrasion on right cheek approx. 2cm x 1cm;

29. The investigating officer recorded the statement of informant and injured-Vishal, Vikas, Rahul, Akash, Keshav, Ankit, Shiva, Ajay, Devendra, under section 161 Cr.P.C. who supported the prosecution story. As per statement of informant and injured-Vishal, Vikas, Rahul, Akash, Keshav, Ankit, Shiva, Ajay, Devendra, accused persons namely Tushar, Amit @ Dhoni, Ashish and Rahul have fired, as a result of same, injured-Keshav had sustained firearm injury on the hand and the other injured persons were also assaulted in the incident and had received injuries. The prosecution has also relied upon to eyewitnesses namely Akash and Aman, however, the aforesaid witnesses have stated that when they reached the place of occurrence the assault had already taken place and the applicants were standing at the place of occurrence.

30. It is not in dispute between the parties that two injured have suffered gunshot injuries and others have sustained injuries. It is also to be noted that applicants and accused persons are resident of same village. Being the resident of same village, accused persons and the informant including other injured were known to each other. The incident had taken place in intervening night of 21.04.2024 and 22.04.2024 at about 1:00 AM, when informant and other injured came back from marriage to their house. The applicants case rests on the general allegations of assault being made on injured persons by accused persons and specific case with regard to assault by

firearm has been made against accused-Tushar, Amit @ Dhoni, Ashish and Rahul. There are two persons with name of Tushar, have been nominated as accused person in first information report, one being Tushar s/o Mukesh and other being Tushar s/o Sripal. The present anticipatory bail application is filed by persons who have not been alleged as the person who have caused injury by firearm except for Tushar where the prosecution in the first information report has not specified as to which of the accused – Tushar has fired although both the accused Tushar have remained present at the time of occurrence.

31. Applicants along with other accused persons are being proceeded under Sections 147, 148, 149, 452, 352, 307, 323, 325, 324, 504, 506, 427 IPC. As per the submission of learned counsel for applicants, gunshot injuries of injured is on the right arm and left thigh and is not on a vital part. As per the medical opinion three injured have suffered grievous injuries.

32. Section 307 of Indian Penal Code contemplates punishment for attempt to murder. It provides that whoever does any act with such intention or knowledge and under such circumstances that if he by that act caused death, he would be guilty of murder, would be punishable for attempt of murder. For the purpose of Section 307 I.P.C., what is material is the intention or the knowledge and not the consequence of actual act done, for purpose of carrying out intention. The section clearly contemplates an act which is done with intention of causing death but which fails to bring about intended consequence on account of intervening circumstances.

33. To justify a prosecution/conviction under this section, it is not essential that bodily injury capable of causing death should have been inflicted. Although the nature of injury actually caused may often give considerable assistance in coming to a finding as to intention of accused, such intention may also be deduced from other circumstances, and may even, in some cases, be ascertained without any reference at all to actual wounds.

34. It is further to be noted that incident is of mid night hours when informant and other injured persons reached the house after attending the marriage. The previous dispute which had arisen at the marriage, between two children, was resolved. Two persons have suffered firearm injury. As per first information report and statement of the injured, the accused person namely Tushar, Amit @ Dhoni, Ashish and Rahul have fired, as a result of same, injured-Keshav has sustained firearm injury on the hand & 11 persons, as per the prosecution, have suffered injuries in the alleged occurrence.

35. The carrying of firearms by accused persons to the house of informant and suffering of gunshot injuries to injured at the behest of the accused persons is indicative of intention of accused persons to commit culpable homicide more particularly when incident has taken place at the mid night when the accused person are not expected to be on streets near the house of informant under normal circumstances.

36. It is further to be noted that the 11 persons have been injured out of which two persons have suffered gunshot injuries. The gunshot injuries has not been attributed to the applicants (except Tushar, however, it has not been specified as to which of the

two accused namely Tushar were the author of gunshot injuries).

37. In general, an accused person is liable to be prosecuted and convicted only in respect of the act which is committed by the accused, however, the difficulty arises when the offence is committed by means of several acts of individuals and which cannot be distinguished or proved as to the part exactly taken by each of them in furtherance of the offence. In such an event, the law imposes joint liability or constructive ability on all accused persons who were involved in offence. Such joint liability or constructive liability may arise from rigours of section 34, section 149 or section 120B of Indian penal code.

38. In the present case, large number of persons have assembled near the house of informant at the mid night hours and thereafter have assaulted, as a result of the same, 11 persons have been injured from the informant side out of which two persons suffered gunshot injuries. As per the prosecution case four persons have been alleged to have fired namely Tushar, Amit @ Dhoni, Ashish and Rahul and there are general role of assault assigned to the nominated accused person which has resulted in 11 persons suffering injuries.

39. Section 149 of the Indian penal code provides, if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence

40. Section 141 of Indian Penal Code prescribes unlawful assembly and the same is quoted herein below :

> *141. Unlawful assembly.—An assembly of five or more persons is designated an "unlawful assembly", if the common object of the persons composing that assembly is—*
>
> *First.—To overawe by criminal force, or show of criminal force, 12[the Central or any State Government or Parliament or the Legislature of any State], or any public servant in the exercise of the lawful power of such public servant; or*
>
> *Second.—To resist the execution of any law, or of any legal process; or*
>
> *Third.—To commit any mischief or criminal trespass, or other offence; or*
>
> *Fourth.—By means of criminal force, or show of criminal force, to any person, to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or*
>
> *Fifth.—By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.*
>
> *Explanation.—An assembly which was not unlawful when it assembled, may subsequently become an unlawful assembly.*

41. The visiting of accused persons in midnight at house of informant, when informant and injured person came back to their house thereafter the assault has been made, is indicative of planning made by accused persons. It is not in dispute that as per first information report more than five persons have reached the house of informant and have assaulted. The members of aforesaid assembly were carrying firearm weapons and other weapons which is indicative of intention with which the aforesaid accused persons went to house of informant more particularly when the previous dispute at the marriage between the children's was already resolved. Under ordinary circumstances no person is expected to be on streets in the midnight. No explanation has been offered by learned counsel for applicants, as to why, the accused persons including applicants were on the streets near the house of informant in the midnight.

42. It is contended by learned counsel for applicants that eyewitness Akash and Aman have stated that applicants were standing at place of occurrence and as such mere standing at the place of occurrence by itself cannot be said that applicants were members of unlawful assembly. The said argument of learned counsel for the applicants cannot hold the field as the aforesaid witnesses have also stated that when they reached the place of occurrence when major part of the assault has already taken place. Once the aforesaid witnesses have already stated that they are not the witness to the complete incident then it cannot be said that the applicants were not the member of the unlawful assembly more particularly when the injured witnesses have supported the prosecution case.

43. It is further to be noted that as per prosecution, applicants were part of unlawful assembly and also participated in offence which aspect has not been challenged by applicants but only submission that has been advanced is that applicants were only standing at the place of occurrence. It is to be seen that incident is of midnight and under ordinary circumstances persons are expected to be in their house however no explanation has been offered on behalf of applicants, as to why, applicants' presence has been shown at the place of occurrence by the prosecution. The injured in their statement have stated that applicants were also the participants in crime. The first information report indicates that about 19 known persons and one unknown person were participants in offence. There are injuries to 11 persons out of which two have sustained firearm injury. At this stage it cannot be denied that accused persons had intention to commit an offence, the manner in which the accused person had visited the house of the informant by forming an assembly of persons with the purpose of committing an offence would prima facie make all the participants of the unlawful assembly liable for offence.

44. In **Sabita Paul v. State of West Bengal, 2024 INSC 245**, the Supreme Court has held as under :-

> *"6. The concept of anticipatory bail came to be part of the criminal law landscape via the 41st Report of the Law Commission which recommended the inclusion of such a provision, which then stood incorporated in the Code of Criminal Procedure, 1973. Over the years, many judgments of this Court have considered that a Court*

*must weigh while considering an application for anticipatory bail. In Dr. Naresh Kumar Mangla v. Anita Agarwal & Ors1 ., a three-Judge Bench laid down the following factors : "17. The facts which must be borne in mind while considering an application for the grant of anticipatory bail have been elucidated in the decision of this Court in Siddharam Satlingappa Mhetre v. State of Maharashtra [Siddharam Satlingappa Mhetre v. State of Maharashtra, (2011) 1 SCC 694 : (2011) 1 SCC (Cri) 514] and several other decisions. The factors to be considered include : (SCC pp. 736-37, paras 112-13) "112. ...*

*(i) the nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;*

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

*(iii) the possibility of the applicant fleeing from justice;*

*(iv) the likelihood of the accused repeating similar or other offences;*

*(v) whether the accusations have been made only with the object of injuring or humiliating the applicant by arresting them;*

*(vi) the impact of the grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people; (2021) 15 SCC 777*

*(vii) the courts must carefully evaluate the entire material against the accused. The court must also clearly comprehend the exact role of the accused in the case. The cases in which the accused is implicated with the help of Sections 34 and 149 of the Penal Code, 1860 the court should consider with even greater care and caution because over implication in such cases is a matter of common knowledge and concern;*

*(viii) while considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors, namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;*

*(ix) the reasonable apprehension of tampering of the witnesses or apprehension of threat to the complainant;*

*(x) frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail."*

45. In **Shrikant Upadhyay and others Vs State of Bihar and another, 2024 INSC 202** has observed as under

*"19. The relief of Anticipatory Bail is aimed at safeguarding individual rights. While it serves as a crucial tool to prevent the misuse of the power of arrest and protects innocent individuals from harassment, it also presents challenges in maintaining a delicate balance between individual rights and the interests of justice. The tight rope we must walk lies in striking a balance between safeguarding individual rights and rotecting public interest. While the right to liberty and presumption of innocence are vital, the court must also consider the gravity of the offence, the impact on society, and the need for a fair and free investigation. The court's discretion in weighing these interests in the facts and circumstances of each individual case becomes crucial to ensure a just outcome."*

46. The power of anticipatory bail is somewhat extraordinary in character and it is to be exercised only in exceptional cases where the person is falsely implicated. Though in many cases it was held that bail is said to be a rule, it cannot, by any stretch of imagination, be said that anticipatory bail is the rule.

47. The court owes duty that justice is done to all the parties (i.e.) accused, prosecution, informant, complainant and victim). The citizens in terms of constitutional mandate are required to abide by law. Where from the material and allegation against an accused, offence is made out, the accused is required to show exceptional circumstances warranting the protection of liberty. No circumstances have been shown by applicant(s) to demonstrate that personal liberty of accused in the facts and circumstances of the case is required to be protected. In the facts and circumstances of the case, the grant of anticipatory bail would lead to miscarriage of justice.

48. The Court is required to exercise jurisdiction of anticipatory bail on sound judicial principles. The court should be slow to grant anticipatory bail to an accused who does not abide by law and commits an offence. In the present case, it is not shown by the applicant(s) that the prosecution or complainant has falsely implicated the applicant(s). One cannot lose sight of the fact that unwarranted protection to an accused has adverse effect on the peace and tranquillity of society at large and effects maintenance of law and order in the society. The jurisdiction of anticipatory bail permits the accused to be not produced before the ordinary jurisdictional court although ordinary jurisdictional court at grass root level have greater experience and exposure with regard to situation of maintenance of law and order at the local place. The process of anticipatory bail permits consideration of anticipatory bail by Session Court or High Court and not by Magistrate courts. Facts and circumstance of each case is to be examined at the time of consideration of anticipatory bail.

49. A perusal of the First Information Report and the material available during investigation would show that offence is made out against the applicants. It is not a case where no offence is made out against an accused.

50. The grant of anticipatory bail to accused in the present case would have

adverse impact on protection of rights and interest of the informant/victim.

51. The nature and gravity of offence and the role play by applicants disentitle the applicants to grant of anticipatory bail. Applicants have failed to show that there is harassment, humiliation and unjustified detention of applicants. It is also not shown that there is over implication of the applicants or the applicants have been falsely implicated or there is frivolity in prosecution. A person who has committed an offence is not entitled to grant of discretionary jurisdiction of anticipatory bail unless it is shown that the accused is falsely implicated or is entitled for protection of liberty. A person who has violated the law and has not shown exceptional circumstances is not entitled to the benefit of extraordinary jurisdiction. No extraordinary circumstances have been shown by applicants that refusal to grant anticipatory bail would lead to injustice. Even otherwise, the applicants have failed to demonstrate factors which would entitle the applicants for anticipatory bail.

52. In view of the above, the present anticipatory bail applications lacks merit and are accordingly dismissed.

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**(2024) 11 ILRA 238**
**APPELLATE JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 14.11.2024**

**BEFORE**

**THE HON'BLE ASHWANI KUMAR MISHRA, J.**
**THE HON'BLE DR. GAUTAM CHOWDHARY, J.**

Criminal Appeal No. 337 of 2020

**Neeraj** **...Appellant**

**Versus**

**State of U.P.** **...Respondent**

**Counsel for the Appellant:**
Deepak Kaushaik

**Counsel for the Respondent:**
G.A.

आपराधिक विधि - भारतीय दंड संहिता, **1860** - धारा **376** - लैंगिक अपराधों से बालकों का संरक्षण अतिधनियम - **2012** - धारा **6, ¾** - आजीव कारावास - अर्थदंड – दंड प्रक्रिया संहिता, **1973** - धारा **161, 164, 313 – 8** वर्ष से अधिक समय से कारागार में सजा भुगत चुका हैं - अभियोजन पक्ष के अनुसार वादी मुकदमा ने एक लिखित तहरीर दी कि दिनांक **27.09.2017** को प्रार्थी की लड़की पीड़िता **(**प्रथम**)** आयु **5** वर्ष व पीड़िता **(**द्वितीय**)** आयु **4** साल दोनों बच्चियों गली में खेल रही थी, तभी अभियुक्त गली में आया और दोनों बच्चियों के साथ असलील हरकत करने लगा – बाद में अभियुक्त ने बड़ी लडकी का मुँह दबाकर नजदीक के खाली प्लाट में ले गया - छोटी बच्ची चिल्लाते हुए घर पर गई और घर वालों को पूरी घटना के बारे में बताया, घर वाले तथा पड़ोस में रहने वाले कुछ व्यक्तियों ने प्लाट में जाकर देखा तो अभियुक्त पीड़िता के साथ अश्लील हरकत कर रहा था - विवेचक द्वारा विवेचना की गयी एवं अभियुक्त के विरुद्ध पर्याप्त साक्ष्य पाए जाने पर विचरण हेतु आरोप पत्र दाखिल किया गया| **(**प्रस्तर **2, 4)**

अपीलार्थी ने तर्क दिया कि उसे रंजिशन वर्तमान मामले में असत्य व कपोल-कल्पित तथ्यों के आधार पर झूठा फसाया गया है - उन्होंने आगे कहा कि कुछ अभियोजन साक्षियों के पक्षद्रोही हो जाने का कोई विपरीत प्रभाव अभियोजन के विरुद्ध नहीं पड़ता है, क्योंकि पक्षद्रोही साक्षीयों ने भी अपने साक्ष्य में तथाकथित घटनास्थल पर घटना के घटित होने की बात मानी है, परंतु घटनास्थल पर स्वयं को उपस्थित न होने संबंधी अभिकथन करते हुए अभियोजन के विरुद्ध अभिकथन किया है। **(**प्रस्तर **41)**

अभिनिर्धारित, पीड़िता के साथ बलात्कार की घटना अभियुक्त के द्वारा ही कारित की गई है, यह अभियोजन साक्षियों द्वारा दिए गए बयान से साबित है, इसके अलावा मेडिकल साक्ष्य व अन्य दस्तावेजीय साक्ष्य से भी युक्ति-युक्त संदेह से परे प्रमाणित है। **(**प्रस्तर **46, 47)**

दाण्डिक अपील आंशिक रूप से स्वीकार (E-13)

प्रोद्धृत मामलों की सूची:

1. राजा और अन्य बनाम कर्नाटक राज्य (2016) 10 एससीसी 506, (प्रस्तर 32)

2. गंगा भवानी बनाम रामपति वेकटरेडी व अन्य, क्रिमिनल अपील 86/11 तथा

3. क्रिमिनल अपील 84/11, दिनांक 04-09-2013, (प्रस्तर 9)

4. दत्तुराव सजारे बनाम स्टेट आफ महाराष्ट्र (1997) 5. एस०सी०सी० 341

5. मोतीलाल बनाम स्टेट आफ मध्य प्रदेश (2008) 11. एस०सी०सी० 20

6. स्टेट आफ हिमांचल प्रदेश बनाम संजय कुमार (2017) 2, एस०सी०सी० 51, (प्रस्तर 31)

7. विजय बनाम स्टेट आफ मध्य प्रदेश (2010) 8, एस.सी.सी. 191

8. लोकेश बनाम स्टेट, क्रिमिनल अपील 487/ 2016 निर्णय दिनांकित 07 जून 2019

9. स्टेट आफ उड़ीसा बनाम ठकारा बेसरा (2002) 9 एस०सी०सी० 86

10. टी.के. गोपाल बनाम कर्नाटक राज्य 2000 (6) एससीसी 168

11. भग्गी उर्फ भागीरथ उर्फ नारन बनाम मध्य प्रदेश राज्य (2024) 5 एससीसी 782

12. गुरमुख सिंह बनाम हरियाणा राज्य (2009) 15 एससीसी 635

13. राज बाला बनाम हरियाणा राज्य और अन्य (2016) 1 एससीसी 463

14. बाबू बनाम उत्तर प्रदेश राज्य, दाण्डिक अपील संख्या 2878/2013, निर्णय दिनांक 15.07.2022, (प्रस्तर 14 से 20)

15. श्यामवीर बनाम उत्तर प्रदेश राज्य और अन्य, दाण्डिक अपील संख्या 4378/2019, निर्णय दिनांक 1.5.2024

(माननीय डा० न्यायमूर्ति गौतम चौधरी द्वारा पारित न्याय-पत्र)

1. वर्तमान दाण्डिक अपील सं. 337 सन् 2020 अपीलार्थी नीरज की ओर से, मु.अ.सं. 1030/2017 अंतर्गत धारा 376 भा.दं.सं. व ¾ पॉक्सो अधिनियम, थाना बडौत, जनपद बागपत से उद्भूत सत्र परीक्षण संख्या 84/2017 में सत्र न्यायाधीश, बागपत द्वारा पारित निर्णय व आदेश दिनांक 11.12.2019 के विरूद्ध दायर की गयी हैं, जिसके द्वारा अपीलार्थी को धारा 6 लैंगिक अपराधों से बालकों का संरक्षण अधिनियम के अंतर्गत दोषसिद्ध पाते हुए आजीवन कारावास तथा रु. 100000/- अर्थदण्ड से दण्डित किया गया है, के विरूद्ध दायर की गयी है।

2. संक्षेप में अभियोजन कथानक यह है कि वादी मुकदमा अमित कुमार पुत्र बीरसिंह, निवासी गली नम्बर 14 आजादनगर, बडौत, जिला बागपत की ओर से एक लिखित तहरीर इस आशय का थानाप्रभारी बडौत, जिला बागपत को दिया गया है कि **दिनांक 27/09/2017 को तकरीबन 4 बजे** प्रार्थी की लड़की पीड़िता प्रथम आयु 5 साल व पीड़िता द्वितीय आयु 4 साल दोनों बच्चियां गली में खेल रहीं थीं तभी गली नम्बर 9 का नीरज पुत्र राजकुमार निवासी आजादनगर बडौत गली में आया और दोनों बच्चियों के साथ अश्लील हरकत करने लगा। जब दोनों बच्चियां डर कर चिल्लायी तो नीरज ने बड़ी लडकी का मुँह दबाकर नजदीक के खाली प्लाट में ले गया। छोटी बच्ची चिल्लाती हुयी घर गयी और घर वालों को बताया। घर वाले दौडकर गये साथ में पड़ोस में रहने वाला जगवीर, सुभाष, कुलवीर व बाबा बीर सिंह, चाचा सुमित ने प्लाट में जाकर देखा तो नीरज, पीडिता प्रथम का कच्छा निकाल रहा था और अश्लील हरकत कर रहा था। नीरज लोगों को देखकर पीडिता प्रथम को उसी हालत में छोड़कर भागने लगा। बहुत मुश्किल से पकड़ा। लोगों ने आक्रोश में आकर मारने लगे। कुछ संभ्रान्त लोगों ने नीरज को छुड़ाया और सभी थाने पर लेकर आये। वह घर से बाहर था। घर आया तो लोगों ने बताया। निवेदन किया कि नीरज के खिलाफ कड़ी से कड़ी कार्यवाही की जाये।

3. वादी मुकदमा की तहरीर के आधार पर अभियुक्त के विरूद्ध प्रथम सूचना रिपोर्ट धारा 376 भा०द०सं० व धारा 7/ 8 लैंगिक अपराधों से बालकों का संरक्षण अधिनियम में दर्ज की गयी एवं विवेचना प्रारम्भ हुयी।

4. विवेचक द्वारा विवेचना की गयी एवं आवश्यक साक्ष्य संकलित किये गये। नक्शा नजरी तैयार किया गया एवं बाद विवेचना अभियुक्त के विरूद्ध पर्याप्त साक्ष्य पाये जाने पर विचारण हेतु आरोपपत्र धारा 376 भा०द०स० एवं धारा 3/4 लैंगिक अपराधों से बालकों का संरक्षण अधिनियम में प्रस्तुत कर दिया गया। आरोपपत्र आने पर न्यायालय द्वारा उस पर संज्ञान लिया गया।

5. विचारण न्यायालय द्वारा दिनांक 12/03/2018 को अभियुक्त के विरूद्ध आरोप अन्तर्गत धारा 376 भा०द०सं० व धारा 3/4 लैंगिक अपराधों से बालकों का संरक्षण अधिनियम में

विरचित किया गया। आरोपों से इन्कार कर अभियुक्त ने विचारण की मांग की।

6. प्रस्तुत मामले में पीड़ित बच्चियां 12 साल से कम आयु की क्रमशः 4 व 5 साल की थी इसलिये दिनांक 23/09/2019 को धारा 5/6 लैगिक अपराधों से बालकों का संरक्षण अधिनियम में आरोप विरचित किया गया। आरोप पढ़कर अभियुक्त को सुनाया व समझाया गया जिससे इन्कार करते हुये अभियुक्त द्वारा विचारण चाहा गया। तदोपरान्त अभियोजन पक्ष को साक्ष्य का अवसर प्रदान किया गया।

7. अभियोजन की ओर से अपने कथानक को साबित करने के लिये अभियोजन साक्षी सं. 01 अमित कुमार, अभियोजन साक्षी सं. 02 मिथलेश, अभियोजन साक्षी सं. 03 वीरसिंह, अभियोजन साक्षी सं. 04 कपिल, अभियोजन साक्षी सं. 05 सुमित, अभियोजन साक्षी सं. 06 प्रथम पीडिता, अभियोजन साक्षी सं. 07 द्वितीय पीडिता. अभियोजन साक्षी सं. 08 जगवीर सिंह, अभियोजन साक्षी सं. 09 सुभाषचन्द, अभियोजन साक्षी सं. 10 सरला देवी, अभियोजन साक्षी सं. 11 डॉ० शाहजहों, अभियोजन साक्षी सं. 12 एस०आई० सत्यवीर सिंह, अभियोजन साक्षी सं. 13 लेडीज कॉ० तनु सैनी, अभियोजन साक्षी सं. 14 कॉ० लोकेन्द्र सिंह को परीक्षित कराया गया।

8. प्रलेखीय साक्ष्य में अभियोजन की ओर से तहरीर प्रदर्श क01, फर्द लेने कब्जा पीडिता. बयान प्रथम पीड़िता प्रदर्श क 4, बयान द्वितीय पीड़िता प्रदर्श कउ, पीड़िता प्रथम व द्वितीय का चिकित्सीय प्रपन्न प्रदर्श क 5 एवं प्रदर्श क 6. नक्शा नजरी प्रदर्श क 7. आरोपपत्र प्रदर्श क 8. फर्द पीड़िता द्वितीय प्रदर्श 9, प्रथम सूचना रिपोर्ट प्रदर्श क 10, जी०डी० प्रदर्श क 11 के रूप में प्रस्तुत किया गया है।

9. **अभियोजन साक्षी सं. 1 अमित** ने अपनी मुख्य परीक्षा में कथन किया कि दिनांक 27/09/2017 को वह अपने घर पर नहीं था। वह घर से बाहर गया हुआ था। **लोगों के कहने से उसने थाना बड़ौत पर तहरीर दे दी थी। तहरीर उसने लोगों के कहने से लिखायी थी। उसके सामने कोई घटना घटित नहीं हुयी थी।** उस समय जो पड़ोस के लोगों ने बताया था। उसी के अनुसार तहरीर दे दी थी। तहरीर को गवाह ने प्रदर्श क 01 के रूप में प्रमाणित किया है तथा उस पर अपने हस्ताक्षर की पुष्टि की है। इस साक्षी को **अभियोजन पक्ष ने पक्षद्रोही घोषित** कराया है और प्रतिपरीक्षा की है जिसमें यह आया है कि यह कहना सही है कि प्रथम पीड़िता उसकी पुत्री है जिसकी उम्र 08 वर्ष की है। यह कहना सही है कि इस घटना की तहरीर उसके द्वारा दी गयी थी। आगे कहता है कि दरोगा जी को उसने कोई बयान नहीं दिया था। धारा 161 दं०प्र०सं० में उसने दरोगा जी को कोई बयान नहीं दिया था और यदि दरोगा जी ने पीड़िताओं के बलात्कार सम्बन्धी बात लिख ली हो तो इसका यह कारण नहीं बता सकता। उसने समझौता करने की बात सुझाने पर इन्कार किया।

10. **अभियोजन साक्षी सं. 02 मिथलेश** ने अपनी मुख्य परीक्षा में बयान दिया है कि वह पीडिता की दादी लगती है। इस घटना को उसने नहीं देखा था। नीरज पुत्र राजकुमार उसकी पोती पीड़िता को उसके सामने नहीं लेकर गया था। पीड़िता के साथ कोई गलत हरकत करते नहीं देखा। उसने अपने घर पर ही सुना था। नीरज को कोई घटना कारित करते नहीं देखा था। उसके सामने ना ही नीरज को दोनों बच्चियों के साथ छेड़छाड़ करने के आरोप में पकड़ा गया, ना ही पुलिस ने पीडिता को उसकी सुपुर्दगी में दिया था। सुपुर्दगीनामा पर उसके हस्ताक्षर हैं जो प्रदर्श क 2 है। इस साक्षी को भी **अभियोजन पक्ष ने पक्षद्रोही घोषित** कराकर जब प्रतिपरीक्षा की तो इस साक्षी ने भी कहा है कि वह घटना की तिथि को 4 बजे बाजार में सामान लेने गयी थी। उसने कोई घटना नहीं देखी। प्रथम पीड़ता ने उसे कोई घटना नहीं बतायी। इस साक्षी ने यह माना है कि अमित कुमार ने थाने पर रिपोर्ट लिखायी थी और यह भी कहा है कि उसे दो दिन बाद पता चला था। इस साक्षी ने पुलिस को धारा 161 दं०प्र०सं० में दिये गये बयान से इन्कार किया है और जब सुझाव दिया गया कि समझौता करने के कारण उसके द्वारा झूठा अभिकथन किया जा रहा है तो उसने सुझाव से इन्कार किया है।

11. **अभियोजन साक्षी सं. -03 बीरसिंह** ने अपनी मुख्य परीक्षा में बयान दिये हैं कि दिनांक 27/09/2017 को वह अपने घर पर था। शाम के लगभग चार बज रहे थे। वह अपने घर से कहीं नहीं गया था। पीडिता द्वितीय व पीड़िता प्रथम उसकी पोती लगती है। पीड़िता प्रथम पड़ोसी की लड़की है। उसने कोई घटना नहीं देखी। उसने नीरज हाजिर अदालत अभियुक्त को लडकी के साथ कोई हरकत करते हुये नहीं देखा। उसका घर नीरज के घर से 1/2 कि०मी० दूर है। इस साक्षी को भी **अभियोजन पक्ष ने पक्षद्रोही घोषित** कराकर जब प्रतिपरीक्षा की गयी तो इस साक्षी ने यह कहा है कि उसे लोगों ने बताया था कि नीरज ने पीड़िता प्रथम व पीडिता द्वितीय के साथ अश्लील हरकत की है।

12. **अभियोजन साक्षी सं. 04 कपिल** ने अपनी मुख्य परीक्षा में बयान दिये हैं कि पीड़िता की उम्र 5 साल है। वह मजदूरी (हलवाई) पर गया हुआ था। शाम को उसे अमित ने बताया था कि बच्चों के साथ नीरज ने छेड़खानी की है। उसने नीरज को

बच्चों के साथ हरकत करते नहीं देखा। नीरज के पिता का नाम उसे नहीं पता। अमित ने उसकी मम्मी पापा को बताया था लेकिन उसे नहीं बताया था। यह थाने नहीं गया था। यह खाना खाकर सो गया था। लड़की के साथ उसकी मम्मी थाने गयी थी। उसकी मम्मी ने उसे कुछ नहीं बताया था न वह घटना स्थल पर था। इस साक्षी को भी **अभियोजन पक्ष द्वारा पक्षद्रोही घोषित** कराकर जब प्रतिपरीक्षा की गयी तो इस साक्षी ने धारा 161 द०प्र०सं० के बयान से इन्कार किया है। इस साक्षी को दिनांक 28/11/2019 को पुनः परीक्षित कराया गया तो इस साक्षी ने यह बयान दिया कि पीड़िता द्वितीय उसकी पुत्री है। उसके घर का नाम व स्कूल का नाम अलग अलग है। यह साक्षी घटना के समय मौके पर नहीं था। उसको शाम को पता चला था। पीड़िता द्वितीय के साथ घटना घटित हुई और उसे यह भी पता चला था कि अभियुक्त नीरज को लोगों ने पकड़ लिया था तथा थाने ले गये थे। पीड़िता प्रथम के साथ भी घटना होना सुना था। उसे ध्यान नहीं कि बच्चे सूसू की जगह दर्द बता रहे थे।

13. **अभियोजन साक्षी सं. 05 सुमित** ने अपनी मुख्य परीक्षा में कथन किये है कि अमित पुत्र वीर सिंह उसके पड़ोस का रहने वाला है तथा उसका भाई है। उसके भाई अमित कुमार की पुत्री आयु 5 साल, दूसरी पीड़िता के साथ दिनांक 27/09/2017 को नीरज पुत्र राजकुमार ने उसके सामने पीड़िताओं को मुँह दबाकर खाली प्लाट में ले जाकर अश्लील हरकत नहीं की थी तथा न ही उसके सामने पीड़िताओं के साथ बलात्कार किया था। इस साक्षी को भी **अभियोजन पक्ष द्वारा पक्षद्रोही घोषित** कराकर जब प्रतिपरीक्षा की गयी तो इस साक्षी ने भी कहा है कि उसने दरोगा जी को कोई बयान नहीं दिया था। इस साक्षी ने यह स्वीकार किया है कि पीड़िता प्रथम की उम्र बयान के दिन 05 वर्ष की है तथा पीड़िता द्वितीय की उम्र 04 वर्ष है। फैसला की बात इस साक्षी ने भी मना किया है।

14. **अभियोजन साक्षी सं. 06 पीड़िता प्रथम** ने न्यायालय द्वारा बयान देने की सक्षमता का परीक्षण करने के लिए निम्नलिखित प्रश्न पूंछेः-

प्रश्न- आपके पिताजी का नाम क्या है ?

उत्तर- वीर सिंह।

प्रश्न- कौन से स्कूल में पढ़ती हो ?

उत्तर- जे०बी० पब्लिक स्कूल।

प्रश्न- सच बोलना चाहिये या झूठ ?

उत्तर- सच।

प्रश्न- सच क्यों बोलना चाहिये ?

उत्तर- जो झूठ बोलता है उसके गले में सॉप होता है।

तत्कालीन पीठासीन विशेष न्यायाधीश ने पीड़िता प्रथम को शपथ दिलाकर अधोलिखित प्रश्न किये –

प्रश्न- आपके साथ घटना वाले दिन कौन कौन था ?

उत्तर- भूल गये।

प्रश्न- अभियुक्त क्या करता है ?

उत्तर- अभियुक्त हमारे घर में पुताई कर रहा था।

प्रश्न- अभियुक्त किस किस को साथ लेकर गया था ?

उत्तर- मुझे और पीड़िता द्वितीय को।

प्रश्न- क्या कहकर लेकर गया था ?

उत्तर- 10 रूपये देने की कह रहा था।

प्रश्न- उसने आपके व पीड़िता द्वितीय के साथ क्या किया था ?

उत्तर- मुझे पता नहीं. पीड़िता द्वितीय का भी पता नहीं।

प्रश्न- फिर उस लड़के को पकड़ लिया था ?

उत्तर- नहीं वह भाग गया था।

प्रश्न- पुलिस कब आयी थी ?

उत्तर- मैं, मेरी मम्मी, पीड़िता द्वितीय और उसकी मम्मी गये थे, पुलिस के पास।

प्रश्न- पुलिस को क्या बताया था ?

उत्तर- पता नहीं।

प्रश्न- महिला पुलिस ने कुछ पूँछा था ?

उत्तर- हॉ जी मैनें बताया था फिर उसके बाद मैं भूल गयी थी।

प्रश्न- आप रोये थे जब लड़के / अभियुक्त ने छेड़छाड़ की थी ?

उत्तर- जी हॉ।

प्रश्न- फिर सारी बात किसको बतायी ?

उत्तर- पीडिता द्वितीय ने अपनी मम्मी को बतायी, फिर उसकी मम्मी ने मुझसे पूछा फिर मैनें अपने पापा-मम्मी को बतायी।

प्रश्न- जज मैडम ने आपसे पूछताछ की थी ?

उत्तर- जी हाँ मैनें बता दिया था।

तत्कालीन पीठासीन विशेष न्यायाधीश ने यह भी उल्लेख किया है कि इस साक्षी ने अभियुक्त को पहचाना और जब इस साक्षी से यह पूँछा गया कि अभियुक्त अच्छा व्यक्ति है या बुरा तो इस साक्षी ने अभियुक्त को बुरा व्यक्ति बताया। जब इस साक्षी से प्रतिपरीक्षा में इस आशय का प्रश्न पूँछा गया कि जिस व्यक्ति को पुलिस लेकर आयी थी, उस व्यक्ति ने उसके व पीडिता द्वितीय के साथ कोई गलत काम तो नहीं किया तो इस साक्षी ने न में सिर हिलाया।

15. **अभियोजन साक्षी सं. 07 पीडिता द्वितीय** ने न्यायालय द्वारा उसकी सक्षमता का परीक्षण करने के लिये निम्नलिखित प्रश्न पूँछे-

प्रश्न- आप कौन सी कक्षा में पढ़ते हो ?

उत्तर- यू० के०जी०।

प्रश्न- कौन से स्कूल में पढ़ते हो ?

उत्तर- जे०बी० पब्लिक स्कूल।

प्रश्न- सच बोलना चाहिये कि झूठ ?

उत्तर- सच।

प्रश्न- झूठ बोलने से क्या होता है ?

उत्तर- पिटाई।

इस साक्षी को सक्षम पाते हुये पूर्व पीठासीन अधिकारी ने शपथ पर निम्नलिखित बयान लिया

प्रश्न- क्या हुआ था ?

उत्तर- उस दिन रात को हम थाने गये थे। उस लोन्डे (लडके) को पकड़ लिया था, पूछा था बुला लिया था। मुझसे जो पुलिस ने पूछा था, बता दिया था।

प्रश्न- उस लड़के ने कुछ किया था ?

उत्तर- नहीं।

प्रश्न- यह लड़का (लौन्डा) कहीं लेकर गया था ?

उत्तर- पीड़िता प्रथम के घर में लेकर गया था। मुझे उन लोगों का नाम नहीं पता।

प्रश्न- वह घर में किस किस को लेकर गया था ?

उत्तर- एक अन्य नाबालिग लड़की, पीड़िता प्रथम और मुझे ।

प्रश्न- क्या कहकर लेकर गया था लौन्डा (लड़का)?

उत्तर- साईकिल ठीक कर रहा था यह पीड़िता प्रथम वगैरह के पुताई कर रहा था।

प्रश्न- फिर आपके साथ क्या किया ?

उत्तर- कई साल की बात हो गयी याद नहीं।

प्रश्न- उसने आपके साथ कोई गलत हरकत की थी ?

उत्तर- नहीं. मुझे पता नहीं क्यो पकड़ा उसे। मेरे एक जज मैडम ने बयान लिये थे। अभियुक्त को दिखाने पर अभियुक्त की शिनाख्त की गयी।

16. **अभियोजन साक्षी- 08 जगवीर सिंह** ने अपनी मुख्य परीक्षा में बयान दिया है कि दिनांक 27/09/2017 को चार बजे उसके पडोस की लड़की पीडिता प्रथम, पीड़िता द्वितीय (पोती) जो उसकी सगी है, गली में खेल रही थी। उसके सामने नीरज पुत्र राजकुमार जो आजादनगर बडौत का रहने वाला है उसके सामने पीड़िता प्रथम व पीड़िता द्वितीय के साथ कोई अश्लील हरकत नहीं की थी और न ही नीरज, पीड़िता प्रथम को मुँह दबाकर नजदीक के जगल में ले जाकर उसके सामने बलात्कार नहीं किया था। इस साक्षी को भी **अभियोजन पक्ष द्वारा पक्षद्रोही घोषित** कराकर जब प्रतिपरीक्षा की गयी तो इस साक्षी ने धारा 161 दं०प्र०सं० के बयान से इन्कार किया और समझौते की बात से भी इन्कार किया।

17. **अभियोजन साक्षी- 09 सुभाषचन्द** ने अपनी मुख्य परीक्षा में बयान दिये हैं कि दिनांक 27/09/2017 को वह अपनी ससुराल गाँव तितरौदा गया हुआ था। यह वहाँ से 28/09/2017 को वापस आया था। उसने कोई घटना नहीं देखी। पीड़िता प्रथम व पीड़िता द्वितीय के साथ अभियुक्त नीरज ने क्या किया या नहीं किया उसे जानकारी नहीं है, न ही उसने कुछ देखा है। इस साक्षी को भी **अभियोजन पक्ष द्वारा पक्षद्रोही घोषित** कराकर जब प्रतिपरीक्षा की गयी तो धारा 161 दं.प्र.सं. के बयान से इस साक्षी ने इन्कार किया और उस साक्षी ने भी समझौते की बात से इन्कार किया है।

18. **अभियोजन साक्षी सं. 10 सरला** ने अपनी मुख्य परीक्षा में बयान दिये हैं कि दिनांक 17/09/2017 को शाम के समय वह अपने घर पर नहीं थी। पीड़िता प्रथम व पीड़िता द्वितीय के साथ क्या घटना घटित हुई उसने नहीं देखी थी। हाजिर अदालत अभियुक्त नीरज ने पीड़िता प्रथम व पीड़िता द्वितीय से क्या हरकत की, उसे जानकारी नहीं है। इस साक्षी को भी **अभियोजन पक्ष द्वारा पक्षद्रोही घोषित** कराकर जब प्रतिपरीक्षा की गयी तो इस साक्षी ने धारा 161 दं०प्र०सं० के बयान से इन्कार किया है परन्तु इस तथ्य को सही बताया है कि जब वह घर आयी तो पता चला कि पीड़िता प्रथम व द्वितीय के साथ नीरज ने कोई बदतमीजी की थी। नीरज उसकी कॉलोनी का रहने वाला है।

19. **अभियोजन साक्षी सं. 11 डॉ० शाहजहाँ** ने अपनी मुख्य परीक्षा में बयान दिया है कि दिनांक 27/09/2017 को वह बतौर मेडिकल अफसर पी०एच०सी० बावली पर तैनात थी। पीडिता द्वितीय के बाह्य परीक्षण करने पर शरीर पर चोट के निशान नहीं थे। पीड़िता द्वितीय के आन्तरिक परीक्षण में सूजन (हाईमन) थी तथा उसके द्वारा स्लाईड तथा जॉच हेतु खून का सैम्पल लिया गया था। एक्सरे हेतु लिखा गया था। पीडिता प्रथम के बाह्य जाँच में शरीर पर कोई चोट नहीं पायी गयी थी। लेकिन आन्तरिक जाँच करने पर हायमन पर थोड़ी सी सूजन पायी गयी थी तथा खून की जाँच हेतु एक्सरे रिपोर्ट तथा एक स्लाईड तैयार कर भेजी गयी थी। चिकित्सक

की राय में हायमन पर सूजन हायमन पर किसी हार्ड चीज से छेड़छाड़ करने पर आना सम्भव है। मेडिकल रिपोर्ट को गवाह ने प्रदर्श के 6 एवं प्रदर्श क 5 के रूप में साबित किया है।

20. **अभियोजन साक्षी सं. 12 एस.आई. सतवीर सिंह** ने अपनी मुख्य परीक्षा में बयान दिया है कि दिनांक 27/09/2017 को वह बतौर उपनिरीक्षक बडौत में तैनात था। गवाह ने स्वयं द्वारा कृत विवेचना के तथ्यों का उल्लेख करते हुये घटना स्थल का नक्शा नजरी तैयार करना बताया जिसे प्रदर्श क 7 के रूप में साबित किया है। गवाह ने बाद विवेचना अभियुक्त के विरूद्ध प्रेषित आरोपपत्र को प्रदर्श क 8 के रूप में साबित किया है।

21. **अभियोजन साक्षी सं. 13 लेडीज कॉस्टेबिल तनु सैनी** ने अपनी मुख्य परीक्षा में बयान दिया है कि दिनांक 28/09/2017 को वह थाना बडौत पर बतौर लेडीज कॉस्टेबिल तैनात थी। वह एस आई सतवीर सिंह के साथ मो० आजादनगर में गयी थी। गली नम्बर 14 में खाली प्लाट से पीड़िता की दादी महेन्द्री ने पीडिता द्वितीय की आसमानी रंग की कच्छी बरामद करायी थी जिसे दरोगा जी द्वारा मौके पर सील सर्व मोहर किया गया तथा फर्द तैयार की गयी। फर्द पर उसके भी हस्ताक्षर है। गवाह ने सम्बन्धित फर्द को प्रदर्श क 9 के रूप में पुष्ट किया है।

22. **अभियोजन साक्षी सं. 14 कॉ० लोकेन्द्र सिंह** ने अपनी मुख्य परीक्षा में कथन किये है कि दिनांक 27/09/2017 को वह थाना बडौत पर बतौर कॉ० तैनात था। उस दिन अमित कुमार पुत्र वीर सिंह की तहरीर के आधार पर इस मामलें में मुकदमा पंजीकृत किया जिसकी चिक कम्प्यूटर आपरेटर से बोल बोलकर किता करायी तथा इसका खुलासा जी०डी० में किया। गवाह ने चिक एफ०आई०आर० को प्रदर्श के 10 एवं जी०डी० को प्रदर्श क 11 के रूप में साबित किया है।

23. साक्ष्य समाप्ति के पश्चात अभियुक्त का बयान अन्तर्गत धारा 313 दं०प्र०सं० अंकित किया गया। अभियुक्त ने अभियोजन कथानक को गलत बताया तथा मुकदमा रंजिशन चलना कहा। यह भी कहा कि उसे झूठा फसाया गया है। वह निर्दोष है। वह गरीब व मन्द बुद्धि है। सफाई साक्ष्य पेश करने से इन्कार किया है। अभियुक्त का अतिरिक्त बयान धारा 313 दं०प्र०सं० अंकित किया गया जिसमें अभियुक्त ने यह कहा है कि उसे लोगों ने पकड लिया था। उससे एक बार गलती हो गयी है। अब नहीं होगी। उसका मेन्टल इलाज चल रहा है, उसे चक्कर आता है।

24. सत्र न्यायाधीश ने मामले में उभयपक्ष के विद्वान अधिवक्ताओं के तर्कों को सुनने तथा दिये गये तथ्यों एवं साक्ष्यों के आधार पर यह अभिमत व्यक्त किया है किः- उपरोक्त अभियोजन परिसाक्ष्यों की समीक्षा से स्पष्ट है कि अभियोजन पक्ष द्वारा परीक्षित कराये गये तथ्य के साक्षीगण क्रमशः अभियोजन साक्षी सं. 01 अमित अभियोजन साक्षी सं. 02 मिथलेश, अभियोजन साक्षी सं. 03 बीरसिंह, अभियोजन साक्षी सं. 04 कपिल, अभियोजन साक्षी सं. 05 सुमित, अभियोजन साक्षी सं.08 जगवीर, अभियोजन साक्षी सं. 09 सुभाषचंद, अभियोजन साक्षी सं. 10 सरला यद्यपि कि अभियोजन पक्ष का मुख्य परीक्षा में समर्थन नहीं किया हैं और वे पक्षद्रोही हो गये हैं तथापि प्रतिपरीक्षा में इस आशय का साक्ष्य अभियोजन साक्षी सं. 01 अमित कुमार ने दिया है कि घटना की तहरीर उसने दी थी। साक्षी अभियोजन साक्षी सं. 02 मिथलेश ने यह माना है कि उसे पता चला था कि अमित ने रिपोर्ट लिखायी थी। साक्षी पी०डब्लू 03 बीर सिंह ने भी प्रतिपरीक्षा में यह माना है कि उसे लोगों ने बताया था कि नीरज ने पीडिता प्रथम व पीडिता द्वितीय के साथ अश्लील हरकत की है। अभियोजन साक्षी सं. 04 कपिल के प्रतिपरीक्षा में यह आया है कि उसे शाम को पता चला कि पीड़िताओं के साथ घटना हुई थी और नीरज को लोग पकड़कर थाने ले गये थे। अभियोजन साक्षी सं. 05 सुमित के बयान में यह आया है कि पीड़िताओं की उम्र 12 वर्ष से कम है। अभियोजन साक्षी सं. 10 सरला देवी के भी बयान में यह आया है कि जब वह घर आयी तो उसे पता चला कि नीरज ने पीडिताओं के साथ बदतमीजी की है।

25. इसप्रकार यह स्पष्ट है कि पक्षद्रोही हो जाने के पश्चात भी घटना घटित हो जाने की जानकारी व रिपोर्ट लिखाना पक्षद्रोही साक्षियों ने भी माना है। ऐसी स्थिति में जैसा कि स्थापित विधि है कि पक्षद्रोही साक्षी के सम्पूर्ण बयान को दरकिनार नहीं किया जा सकता और जितना वह घटना को समर्थित कर रहा है उसे अन्य साक्ष्यों के मद्देनजर विश्वास में लिया जा सकता है। माननीय सर्वोच्च न्यायालय द्वारा **Raja and others Vs. State of Karnataka (2016) 10 SCC 506** में जो विधि व्यवस्था प्रतिपादित की है, उसका संगत प्रस्तर निम्नवत उद्धृत है:-

> "32. That the evidence of a hostile witness in all eventualities ought not stand effaced altogether and that the same can be accepted to the extent found dependable on a careful scrutiny was reiterated by this Court in Himanshu @ Chintu (supra) by drawing sustenance of

the proposition amongst others from Khujii vs. State of M.P. (1991) 3 SCC 627 and Koli Lakhman Bhai Chanabhai vs. State of Gujarat (1999) B SCC 624.It was enounced that the evidence of a hosule witness remains admissible and is open for a Court to rely on the dependable part thereof as found acceptable and duly corroborated by other reliable evidence available on record"

26. इसप्रकार यह स्पष्ट है कि प्रस्तुत प्रकरण में यद्यपि कि अभियोजन क्रमशः अभियोजन साक्षी सं. 01अमित, अभियोजन साक्षी सं. 02 मिथलेश, अभियोजन साक्षी सं. 03 बीरसिंह, अभियोजन साक्षी सं. 04 कपिल, अभियोजन साक्षी सं. 05 सुमित, अभियोजन साक्षी सं. 08 जगवीर, अभियोजन साक्षी सं. 09 सुभाषचंद, अभियोजन साक्षी सं. 10 सरला, पक्षद्रोही हो चुके है परन्तु अभियुक्त द्वारा घटना घटित करने सम्बन्धी बात सुने जाने तथा रिपोर्ट लिखाये जाने के तथ्यों के सम्बन्ध में उन्होनें भी अपना बयान दिया है। जहाँ तक अन्य अभियोजन साक्षियों के बयानों में कतिपय अन्तर्विरोधों का प्रश्न है। इसके सम्बन्ध में इस न्यायालय का मत है कि अभियोजन साक्ष्य में आये कतिपय स्वाभाविक अन्तर्विरोधों का लाभ अभियुक्त को नहीं प्राप्त हो सकता क्योंकि अभियोजन साक्षियों के बयान में स्वाभाविक अन्तर्विरोध जो नगण्य प्रकृति का है वह आना अत्यन्त स्वाभाविक है। माननीय सर्वोच्च न्यायालय ने **गंगा भवानी बनाम रामपति वेकटरेडी व अन्य, क्रिमिनल अपील 86/11** तथा क्रिमिनल अपील 84/11 को दिनांक 04-09-2013 को निर्णीत करते हुये निर्णय के प्रस्तर 9 में इस आशय की विधि व्यवस्था दी है कि साक्षियों के बयान में सामान्य किस्म के अन्तर्विरोध आना स्वाभाविक है। जब तक कि वे अन्तर्विरोध इतना सारवान न हो जो कि अभियोजन साक्ष्य के विरूद्ध विपरीत प्रभाव डालता हो, उनको विश्वास में लेकर महत्वपूर्ण साक्ष्यों को दरकिनार नहीं किया जा सकता है। माननीय सर्वोच्च न्यायालय की उक्त विधि व्यवस्था के प्रस्तर 9 को शब्दशः उद्धृत किया जाना समीचीन होगा-

"9. **In State of U.P. v. Naresh, (2011) 4 SCC 324**, this Court afterconsidering a large number of its earlier judgments held: "In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about the truthfulness of the witness and other witnesses also make material improvement while deposing in the court, such evidence cannot be safe to rely upon.

However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety. The court has to form its opinion about the credibility of the witness and record a finding as to whether his deposition inspires confidence. Exaggerations per se do not render the evidence brittle. But it can be one of the factors to test credibility of the prosecution version, when the entire evidence is put in a crucible for being tested on the touchstone of credibility.

Therefore, mere marginal variations in the statements of a witness cannot be dubbed as improvements as the same may be elaborations of the statement made by the witness earlier. The omissions which amount to contradictions in material particulars i.e. go to the root of the case/materially affect the trial or core of the prosecution's case,

render the testimony of the witness liable to be discredited." A similar view has been re-iterated by this Court in Tehsildar Singh & Anr. v. State of U.P., AIR 1959 SC 1012; Pudhu Raja & Anr. v. State, Rep. by Inspector of Police, JT 2012 (9) SC 252; and Lal Bahadur v State (NCT of Delhi), (2013) 4 SCC 557).

27. पीडिता प्रथम के साक्ष्य में यह स्पष्ट आया है कि अभियुक्त द्वारा उसे 10 रूपया देने की लालच के कारण ले जाया गया। पीडिता प्रथम ने यह भी कहा है कि उसने पहले भी जज मैडम को बयान दिया था। पीड़िता प्रथम द्वारा धारा 164 दं०प्र०सं० का जो बयान दिया गया है उसमे निम्नवत अभिकथन किया गया है " मैं खेल रही थी। एक अंकल आये उनका नाम नहीं जानती हूँ। देखकर पहचान जाऊँगी। अंकल ने कहा कि घेर में चलो। पैदल लेकर घेर में गया। मेरी कच्छी निकालकर सुसु निकाल रहा था। मेरा होंठ भींच लिया। उसने अपनी भी कच्छी उतार रखी थी। तभी कोई आ गया तो उसने अपनी कच्छी पहन ली। उसने पीड़िता के भाई को बहकाने के लिये दो रू० दिये थे। वह रोने लगी थी और भागकर छिप गयी थी। तब वो चली गयी। एक लड़का उसे बचाने आया तो उसे भी मारा।"

28. पीडिता द्वितीय ने न्यायालय के समक्ष दिये गये बयान में रात को थाने पर ले जाने की बात मानी है और उस लड़के को पकड़े जाने की बात कही है और यह भी कहा है कि उससे जो पुलिस ने पूँछा उसने बयान दे दिया था। उसने यह भी कहा है कि वह लड़का उन्हें पीड़िता प्रथम के घेर में ले गया था। इस साक्षी ने यह भी सम्पोषित किया कि अभियुक्त पीड़िता प्रथम व उसे तथा एक दूसरे नाबालिग लड़के को ले गया था। इस साक्षी ने यह भी कहा है कि अभियुक्त पुताई का काम कर रहा था। कई साल हो जाने के कारण वह कहती है कि उसे याद नहीं है कि उसके साथ क्या हुआ। परन्तु यह साक्षी एक जज मैडम द्वारा धारा 164 दं०प्र०सं० के बयान को देने की बात मानती है। धारा 164 दं०प्र०सं० का बयान पीड़िता द्वितीय ने प्रदर्श क 03 के रूप में निम्नवत दिया है। उसने कहा है कि " मेरा नाम पीडिता द्वितीय है। एक अंकल पहले पीड़िता प्रथम को लेकर उसके प्लाट में गया था। मैं भी वहाँ पहुँच गयी थी। उसने मेरी कच्छी ने अपना सुसु करने वाला देने लगा था। मेरे सुसु करने वाले में अपना सुसु करने वाला डाल रहा था। उसके बाद चला गया। पीड़िता प्रथम के भी होंठ भींच लिये थे। "

29. धारा 164 द०प्र०सं० के अन्तर्गत पीड़िताओं के बयानों के साथ जब न्यायालय में दिये गये उनके बयानों की समीक्षा करते हैं तो यह साबित होता है कि घटना के दिन और समय पर अभियुक्त नीरज उक्त पीड़िताओं को बहला फुसलाकर घेर में ले गया जहाँ उसने पीडिताओं के साथ बलात्संग किया। पीड़िताओं के साक्ष्यों की पुष्टि डॉक्टर शाहजहाँ लेडी मेडिकल ऑफिसर के बयानों से भी होती है जो उन्होनें अभियोजन साक्षी अभियोजन साक्षी सं. 11 के रूप में न्यायालय में दिये हैं। इस साक्षी ने **यद्यपि कि पीड़िताओं के शरीर पर कोई बाह्य चोटों का होना नहीं पाया तथापि दोनों पीड़िताओं के हायमन में लालिमा व सूजन पाया। इस साक्षी के प्रतिपरीक्षा के बयान के जिस अंश में यह आया है कि पीड़िताओं को गिरने से चोट आ सकती है ऐसा कोई साक्ष्य अभियुक्त द्वारा प्रस्तुत नहीं किया गया है** और न ही किसी अभियोजन साक्षी जो कि पक्षद्रोही हो गये हैं, उन्होंने भी अपने बयानों में यह कहा है कि पीड़िताओं को गिरने से चोटें आयीं हो।

30. अभियुक्त जिसे घटना कारित करते समय ही मौके से पकड़ा गया था और इस सम्बन्ध में प्रदर्श क11 जी०डी० की नकल जो कॉ० लोकेन्द्र कुमार अभियोजन साक्षी सं. 14 द्वारा साबित किया गया है, कि उसे घटना स्थल से गिरफ्तार किया गया था और हिरासत में लिया गया, उसी अभियुक्त नीरज द्वारा जैसा कि पीड़िताओं ने साबित किया है कि उनके साथ बलात्संग किया गया, आरोपित आरोप कारित किया गया।

31. **दत्तुराव सजारे बनाम स्टेट आफ महाराष्ट्र (1997) 5. एस०सी०सी० 341** में माननीय सर्वोच्च न्यायालय द्वारा इस आशय की विधि व्यवस्था प्रतिपादित की गयी है कि- "A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other

competent witness and there is no likelihood of being tutored."

32. **मोतीलाल बनाम स्टेट आफ मध्य प्रदेश (2008) 11. एस०सी०सी० 20** में माननीय सर्वोच्च न्यायालय द्वारा इस आशय की विधि व्यवस्था दी गयी है कि यह एक स्थापित विधि है कि लैंगिक हमले को पीडिता सह अपराधी के रूप में नहीं ली जानी चाहिये। ऐसी स्थिति में उसके साक्ष्य की सम्पुष्टि की आवश्यकता नहीं होती है।

33. **स्टेट आफ हिमांचल प्रदेश बनाम संजय कुमार (2017) 2, एस०सी०सी० 51** के प्रस्तर 31 में इस आशय की विधि व्यवस्था प्रतिपादित की गयी है कि बलात्कार की पीड़िता का साक्ष्य ऐसे मामले में अत्यन्त ही महत्वपूर्ण होता है और जब तक कि कोई ऐसा विश्वास कर देने वाला कारण नहीं हो जिसके द्वारा बलात्कार पीड़िता के अभिकथन की सम्पुष्टि की आवश्यकता पड़ती हो तो न्यायालयों को ऐसे परिसाक्ष्य पर विश्वास करते हुये यदि वह साक्ष्य विश्वसनीय है तो दोषसिद्धि आधारित करनी चाहिये।

34. इसी प्रकार **विजय बनाम स्टेट आफ मध्य प्रदेश (2010) 8, एस.सी.सी. 191** में इस आशय की विधि व्यवस्था प्रतिपादित की गयी है कि अभियोक्त्री का अभिकथन यदि विश्वसनीय है तो उस आधार पर बिना संपोषक साक्ष्य के अभियुक्त को दोषसिद्ध किया जा सकता है।

35. माननीय दिल्ली उच्च न्यायालय ने **लोकेश बनाम स्टेट, क्रिमिनल अपील 487/ 2016 निर्णय दिनांकित 07 जून 2019** में इस मामले के समान ही तथ्य वाले एक मामले में जहाँ पर 04 साल की बालिका का बलात्कार हुआ था उसके साक्ष्य पर आधारित दोषसिद्धि के निर्णय की पुष्टि करते हुये इस आशय की विधि व्यवस्था दी है कि लैगिक अपराध करने वाले अपराधी जो भोले भाले बच्चों के लिये मनोसामाजिक विकृत व्यक्ति होते हैं. उनके ऊपर कोई उदारता नहीं बरती जानी चाहिये। उपरोक्त विधि व्यवस्थाये प्रस्तुत प्रकरण में पूर्णतः लागू होती है।

36. इस न्यायालय की राय में अभियोजन पक्ष युक्तियुक्त संदेह से परे यह साबित करने में सफल रहा है कि दिनांक 27/09/2017 को समय करीब 04 बजे स्थान मौहल्ला आजादनगर खाली प्लाट, थाना बडीत, जिला बागपत में अभियुक्त नीरज द्वारा पीड़िता प्रथम उम्र 05 साल व पीड़िता द्वितीय उम्र 04 साल के साथ बलात्कार एवं गुरुतर प्रवेशन लैंगिक हमला कारित किया गया।

37. **स्टेट आफ उड़ीसा बनाम ठकारा बेसरा (2002) 9 एस०सी०सी० 86** में इस आशय की विधि व्यवस्था प्रतिपादित की गयी कि बलात्कार पीड़िता पर केवल शारीरिक आक्रमण नहीं होता है बल्कि यह पीड़िता के सम्पूर्ण व्यक्तित्व को नष्ट कर देता है। बलात्कारी पीड़िता की आत्मा को भी झकझोर देता है।

38. उपरोक्त सम्पूर्ण विवेचना के पश्चात विचारण न्यायालय का मत है कि पत्रावली पर उपलब्ध सम्पूर्ण मौखिक व प्रलेखीय साक्ष्य के विश्लेषण से यह युक्तियुक्त संदेह से परे साबित होता है कि दिनांक 27/09/2017 को समय करीब 04 बजे स्थान मौहल्ला आजादनगर खाली प्लाट, थाना बडौत, जिला बागपत में अभियुक्त नीरज द्वारा पीड़िता प्रथम उम्र 05 साल पीड़िता द्वितीय उम्र 04 साल के साथ बलात्कार एवं गुरूतर प्रवेशन लैंगिक हमला कारित किया गया जो धारा 376 भा०दं०सं० के अंतर्गत दण्डनीय अपराध है एवम् धारा 5 (m) लैंगिक अपराधों से बालकों का संरक्षण अधिनियम 2012 के अन्तर्गत गुरूतर प्रवेशन लैंगिक हमला की श्रेणी में आता है।

39. तद्नुसार विचारण न्यायालय द्वारा अभियुक्त नीरज को एस०टी० पॉक्सो नम्बर 84/2017, मु०अ०स० 1030/17. अन्तर्गत अन्तर्गत धारा 376 भा०दं० सं० तथा धारा 6 लैगिक अपराधों से बालकों का संरक्षण अधिनियम, थाना बड़ौत, जिला बागपत के अपराध में दोषसिद्ध किया गया तथा चूंकि धारा 376 भा.द.सं. के अंतर्गत दण्ड का प्रावधान कठोर है तथा धारा 6 लैंगिक अपराधों से बालकों का संरक्षण अधिनियम में उसी अपराध के लिए दण्ड गुरुतर है इसलिए अभियुक्त नीरज को उपरोक्त दोनों धाराओं में दोषसिद्ध पाते हुए धारा 6 लैगिक अपराधों से बालकों का संरक्षण अधिनियम के अंतर्गत आजीवन कारावास एवं 1 लाख रुपया अर्थदण्ड से दण्डित किया गया है तथा उन्होंने धारा 376 भा.दं.वि. के अंतर्गत प्रथक से दण्डादेश सुनाए जाने की आवश्यकता नहीं समझी।

40. **हमने अपीलार्थी के विद्वान अधिवक्ता दीपक कौशिक एवं विद्वान अपर शासकीय अधिवक्तागण को सुना तथा पत्रावली का परिशीलन किया।**

41. अपीलार्थी के विद्वान अधिवक्ता ने तर्क प्रस्तुत किया कि अभियुक्त/अपीलार्थी को रंजिशन इस मामले में असत्य व कपोल-कल्पित तथ्यों के आधार पर झूठा फंसाया गया है उनका यह भी कहना है कि अवर न्यायालय में सत्र परीक्षण के दौरान

अभियोजन साक्षीगण क्रमशः अभियोजन साक्षी सं. 01 अमित, अभियोजन साक्षी सं. 02 मिथलेश, अभियोजन साक्षी सं.03 बीरसिंह, अभियोजन साक्षी सं.04 कपिल, अभियोजन साक्षी सं.05 सुमित, अभियोजन साक्षी सं. 08 जगवीर, अभियोजन साक्षी सं. 09 सुभाषचंद, अभियोजन साक्षी सं. 10 सरला के पक्षद्रोही हो जाने का कोई विपरीत प्रभाव अभियोजन के विरूद्ध नहीं पड़ता है क्योंकि पक्षद्रोही साक्षियों ने भी अपने साक्ष्य में तथाकथित घटनास्थल पर घटना के घटित होने की बात मानी है परन्तु घटना स्थल पर स्वयं को उपस्थित न होने सम्बन्धी अभिकथन करते हुये अभियोजन के विरूद्ध अभिकथन किया है। इसप्रकार अभियुक्त/अपीलार्थी निर्दोष है इसके बावजूद भी विचारण न्यायालय द्वारा अभियुक्त/अपीलार्थी को उपरोक्त धाराओं में दोषसिद्ध करते हुए आजीवन कारावास की सजा एवं अर्थदण्ड से दण्डित किया है इसलिए विचारण न्यायालय द्वारा पारित उपरोक्त प्रश्नगत निर्णय अपास्त किये जाने योग्य है।

42. विद्वान अपर शासकीय अधिवक्ता द्वारा अभियुक्त के विद्वान अधिवक्ता के तर्कों पर आपत्ति करते हुए कथन किया गया कि अभियुक्त द्वारा लगभग पीड़िता प्रथम उम्र 05 साल व पीड़िता द्वितीय उम्र 04 साल मासूम पीड़िताओं के साथ जबरदस्ती दुराचार किया गया, जिसके कारण अबोध/अवस्यक लड़कियों को अपने जीवन में दुर्व्यवहार से अवसाद, बाध्यकारी विकार, कम आत्मसम्मान और मानसिक पक्षाघात का सामना करना पड़ता है और समाज में महिलाओं की पहुँच को सीमित करता है। अभियुक्त/अपीलार्थी द्वारा एक जघन्य अपराध **"पीड़िताओं क्रमशः 5 एवं 4 वर्ष"** के साथ किया गया है, अभियुक्त द्वारा कारित अपराध एक जघन्य एवं घृणित किस्म का अपराध है," यदि इस तरह के अपराधी को वर्तमान मे समाज में खुला छोड़ा जाना न्यायहित में व समाज के वर्तमान परिवेश में उचित नहीं होगा ताकि इस उम्र के अबोध बालकों को अपना बचपन स्वछन्द रूप से जी सके।" इस प्रकार विद्वान अपर शासकीय अधिवक्ता ने सत्र न्यायालय के निर्णय का समर्थन किया है, जिसके तहत एक अभियुक्त को दोषी ठहराया गया है और उपरोक्तानुसार सजा सुनायी गयी है। उन्होंने अपने तर्क के समर्थन में न्यायालय का ध्यान निम्नलिखित नजीरों की ओर आकृष्ट कियाः-

**1) T.K. Gopal V/S State of Karnataka 2000 (6) SCC 168**

**(2) Bhaggi Alias Bhagirath Alias Naran V/S State of Madhya Pradesh (2024) 5 SCC 782**

43. **हमने उभय पक्ष के विद्वान अधिवक्ताओं के तर्कों को सुना तथा विचारण न्यायालय के मूल अभिलेख सहित पत्रावली पर रखी गयी सामग्री का सम्यक रूप से परिशीलन किया एवं उन पर गहनतापूर्वक विचार किया।**

44. प्रस्तुत मामले में घटना दिनांक 04.10.2017 को सुबह के लगभग 04 बजे की बतायी गयी है जिसमें अभियुक्त द्वारा लगभग **5 एवं 4 वर्ष** वर्षीय पीड़िताओं के साथ बलात्कार करना कहा गया, डाक्टर एवं पुलिस अधिकारियों द्वारा समस्त प्रदर्शों को साबित किया गया।

45. विवेचक द्वारा प्रथम सूचना रिपोर्ट दर्ज होने के पश्चात समुचित विवेचना की गयी तथा मौके पर जाकर घटना स्थल का नक्शा नजरी आदि तैयार कर अभियुक्त के विरुद्ध आरोप पत्र प्रेषित किया गया तथा उन्होंने नक्शा नजरी प्रदर्श क-7 एवं 8 को साबित किया है ।

46. इस प्रकार दस्तावेजीय व मौखिक साक्ष्यों से स्पष्ट है कि घटना दिनांक 27.09.2017 को लगभग 04 बजे की बतायी गयी है जिसमें अभियुक्त द्वारा लगभग 5 एवं 4 वर्ष वर्षीय पीड़िताओं के साथ निश्चित रूप से बलात्कार किया गया था। यह तथ्य मेडिकल साक्ष्य व अन्य दस्तावेजीय साक्ष्यों से भी युक्ति-युक्त संदेह से परे प्रमाणित है।

47. पीड़िता के साथ उक्त बलात्कार की घटना अभियुक्त नीरज के द्वारा ही कारित की गयी है यह सभी अभियोजन साक्षियों द्वारा दिये गये बयान से साबित है।

48. अभियोजन पक्ष के अनुसार तथा कथित घटना दिनांक 27.09.2017 को लगभग 04 बजे घटित हुई, वादी की पुत्री के साथ अभियुक्त द्वारा दुराचार किया गया, जिसकी पुष्टि चिकित्सीय परीक्षण रिपोर्ट व अन्य साक्ष्यों के होती है। विचारण न्यायालय के अभिलेख एवं इस न्यायालय की पत्रावली पर उपलब्ध साक्ष्यों तथा सत्र न्यायाधीश के निर्णय के परिशीलन से तथा उन पर सम्यक रूप से विचार करने के उपरान्त इस न्यायालय का अभिमत है कि तथाकथित घटना को मौखिक एवं दस्तावेजी सबूतों की सहायता से अभियोजन पक्ष द्वारा साबित किया गया है, जिसका उल्लेख उपर्युक्त किया गया है तथा साबित किये गये साक्ष्यों के आधार पर सत्र न्यायाधीश द्वारा अभियुक्त/अपीलार्थी को उपरोक्तानुसार दोषसिद्ध किया गया है, जिसमें उनके उक्त निर्णय में कोई त्रुटि परिलक्षित नहीं होती है।

49. इस स्तर पर विचारण न्यायालय द्वारा अभियुक्त को दिये गये दण्डादेश पर पुनर्विचार किये जाने हेतु भारतीय दण्ड विधान की धारा 376 (1) & (2) पर विचार किया जाना समीचीन प्रतीत होता है, जोकि निम्नवत हैः-

"[376. Punishment for rape- (1) Whoever, except in the cases provided for in sub-section (2), commits rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine."

50. विचारण न्यायालय द्वारा अभियुक्त को दिये गये दण्डादेश पर पुनर्विचार किये जाने हेतु मा० उच्चतम न्यायालय द्वारा GURMUKH SINGH Vs. STATE OF HARYANA (2009) 15 Supreme Court Cases 635 एवं RAJ BALA Vs. STATE OF HARYANA AND OTHERS (2016) 1 Supreme Court Cases 463 में प्रतिपादित विधि-व्यवस्था एवं उच्च न्यायालय इलाहाबाद द्वारा CRIMINAL APPEAL No. 2878 of 2013 (Babu Vs. State of U.P.) तथा CRIMINAL APPEAL No. 4378 of 2019 (Shyamveer Vs. State of U.P. And Another) का परिशीलन किया गया।

51. अपीलार्थी के विद्वान अधिवक्ता ने न्यायालय का ध्यान वरिष्ठ कारागार अधीक्षक सेन्ट्रल जेल आगरा की आख्या दिनांक 15.03.2024 की ओर आकृष्ट किया जिसके अनुसार अभियुक्त नीरज दिनांक 15.03.2024 तक कुल 7 वर्ष 04माह 2 दिन जेल में निरूद्ध रहा है तथा उक्त तिथि के पश्चात आज निर्णय दिये जाने की तिथि तक वह 01 वर्ष, 01 माह , 8 दिन कारागाह में निरूद्ध रह चुका है। तथा इसके पश्चात से भी अब तक वह कारागार में ही निरूद्ध है। इसप्रकार आज की तिथि तक वह लगभग 8 वर्ष से अधिक समय से कारागार में अपनी सजा भुगत चुका है।

52. सजा के प्रश्न पर विचार करने के स्तर पर हम पाते है कि विचारण न्यायालय ने अभियुक्त/अपीलार्थी को धारा 6 लैंगिक अपराधों से बालकों का संरक्षण अधिनियम के तहत आजीवन कारावास की सजा सुनाई है। चूंकि उक्त घटना के समय धारा 6 लैंगिक अपराधों से बालकों का संरक्षण अधिनियम के अंतर्गत न्यूनतम सजा 10 वर्ष की दी जा सकती थी। इसलिए चूकि तत्समय धारा 6 लैंगिक अपराधों से बालकों का संरक्षण अधिनियम के तहत सजा 10 साल से लेकर उम्र कैद तक होती है, जब अदालत किसी अपराध के लिए अधिकतम स्वीकार्य सजा देने के लिए आगे बढ़ती है, तो कानून का यह मुख्य सिद्धांत है कि ऐसी अधिकतम सजा देने के लिए कारण दिये जाने चाहिए। किन्तु विचारण न्यायालय ने अपने निर्णय में अधिकतम सजा देने के संबंध में कोई खुलाशा नहीं किया है। हमें ऐसा कोई कारण नहीं मिला की जिसका खुलासा विचारण न्यायालय ने किया हो अन्यथा हम पाते है कि ऐसी कोई परिस्थिति नहीं है, जो वर्तमान मामले के तथ्यों में अभियुक्त/अपीलार्थी को अत्यधिक सजा देने को उचित ठहरा सके। यह स्वीकार किया गया है कि अभियुक्त/अपीलार्थी का यह प्रथम अपराध है और उसके खिलाफ इस अपराध से पूर्व ऐसी कोई घटना दर्ज नहीं की गयी है। अभियुक्त के सुधरने की संभावना से इंकार नहीं किया जा सकता। सजा के प्रश्न पर हम दाण्डिक अपील संख्या 2878 वर्ष 2013 (बाबू बनाम उ०प्र० राज्य) में पारित निर्णय दिनांक 15.07.2022 में इस न्यायालय की द्वय-पीठ द्वारा दिये गये निर्णय के कुछ प्रासंगिक प्रस्तरों का उल्लेख करना आवश्यक समझते है, जो निम्नवत हैः-

**"14. While coming to the conclusion that the accused is the perpetrator of the offence, whether sentence of life imprisonment and fine is adequate or the sentence requires to be modified in the facts and circumstances of this case and in the light of certain judicial pronouncements and precedents applicable in such matters. This Court would refer to the following precedents, namely, Mohd. Giasuddin Vs. State of AP, [AIR 1977 SC 1926], explaining rehabilitary & reformative aspects in sentencing it has been observed by the Supreme Court:**

**"Crime is a pathological aberration. The criminal can ordinarily be redeemed and the state has to rehabilitate rather than avenge. The sub-culture that**

**leads to ante-social behaviour has to be countered not by undue cruelty but by reculturization. Therefore, the focus of interest in penology in the individual and the goal is salvaging him for the society. The infliction of harsh and savage punishment is thus a relic of past and regressive times. The human today vies sentencing as a process of reshaping a person who has deteriorated into criminality and the modern community has a primary stake in the rehabilitation of the offender as a means of a social defence. Hence a therapeutic, rather than an 'in terrorem' outlook should prevail in our criminal courts, since brutal incarceration of the person merely produces laceration of his mind. If you are to punish a man retributively, you must injure him. If you are to reform him, you must improve him and, men are not improved by injuries."**

**15. 'Proper Sentence' was explained in Deo Narain Mandal Vs. State of UP [(2004) 7 SCC 257] by observing that Sentence should not be either excessively harsh or ridiculously low. While determining the quantum of sentence, the court should bear in mind the 'principle of proportionality'. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically.**

**16. In Ravada Sasikala vs. State of A.P. AIR 2017 SC 1166, the Supreme Court referred the judgments in Jameel vs State of UP [(2010) 12 SCC 532], Guru Basavraj vs State of Karnatak, [(2012) 8 SCC 734], Sumer Singh vs Surajbhan Singh, [(2014) 7 SCC 323], State of Punjab vs Bawa Singh, [(2015) 3 SCC 441], and Raj Bala vs State of Haryana, [(2016) 1 SCC 463] and has reiterated that, in operating the sentencing system, law should adopt corrective machinery or deterrence based on factual matrix. Facts and given circumstances in each case, nature of crime, manner in which it was planned and committed, motive for commission of crime, conduct of accused, nature of weapons used and all other attending circumstances are relevant facts which would enter into area of consideration. Further, undue sympathy in sentencing would do more harm to justice dispensations and would undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to nature of offence and manner of its commission. The supreme court further said that courts must not only keep in view the right of victim of crime but also society at large. While considering imposition of appropriate punishment, the impact of crime on the society as a whole and rule of law needs to be balanced. The judicial trend in the country has been towards**

**striking a balance between reform and punishment. The protection of society and stamping out criminal proclivity must be the object of law which can be achieved by imposing appropriate sentence on criminals and wrongdoers. Law, as a tool to maintain order and peace, should effectively meet challenges confronting the society, as society could not long endure and develop under serious threats of crime and disharmony. It is therefore, necessary to avoid undue leniency in imposition of sentence. Thus, the criminal justice jurisprudence adopted in the country is not retributive but reformative and corrective. At the same time, undue harshness should also be avoided keeping in view the reformative approach underlying in our criminal justice system.**

**17. Keeping in view the facts and circumstances of the case and also keeping in view criminal jurisprudence in our country which is reformative and corrective and not retributive, this Court considers that no accused person is incapable of being reformed and therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream.**

**18. …….**

**19. …….**

**20. As discussed above, 'reformative theory of punishment' is to be adopted and for that reason, it is necessary to impose punishment keeping in view the 'doctrine of proportionality'. It appears from perusal of impugned judgment that sentence awarded by learned trial court for life term is very harsh keeping in view the entirety of facts and circumstances of the case and gravity of offence. Hon'ble Apex Court, as discussed above, has held that undue harshness should be avoided taking into account the reformative approach underlying in criminal justice system. ”**

53. संपूर्ण साक्ष्यों पर विचार करने के पश्चात् हमारा मानना है कि धारा 6 लैंगिक अपराधों से बालकों का संरक्षण अधिनियम तहत अभियुक्त/अपीलार्थी को आजीवन कारावास की सजा दिया जाना न्यायोचित नहीं है और यदि अभियुक्त को धारा 6 लैंगिक अपराधों से बालकों का संरक्षण अधिनियम के तहत न्यूनतम 10 वर्ष की सजा दी जाय तो न्याय की पूर्ति संभव होगी।

54. अतः यह दाण्डिक अपील आंशिक रूप से स्वीकार की जाती है तथा धारा 6 लैंगिक अपराधों से बालकों का संरक्षण अधिनियम के अंतर्गत अभियुक्त /अपीलार्थी को विचारण न्यायालय द्वारा दी गयी आजीवन कारावास की सजा को संशोधित करते हुए अभियुक्त को धारा **6** लैंगिक अपराधों से बालकों का संरक्षण अधिनियम. के अन्तर्गत **10** वर्ष की सजा देते हैं तथा अभियुक्त के विरूद्ध अधिरोपित कुल अर्थदण्ड की धनराशि रु. 1,00,000/- को भी संशोधित करते हुए उसे कुल रु. **2,00,000**/-(दो लाख रुपया) किया जाता है। अर्थदण्ड की उक्त संशोधित धनराशि अदा न करने पर अभियुक्त को 10 वर्ष के उपरान्त 02 वर्ष का अतिरिक्त कारावास का दण्ड भुगतना होगा। वसूल की गयी अर्थदण्ड की सम्पूर्ण धनराशि पीड़िताओं को प्रदान किया जाये।

55. अभियुक्त/अपीलार्थी को कारागार में 10 वर्ष की सजा भुगतने तथा 02 लाख रुपया अर्थदण्ड की धनराशि अदा करने पर जेल से अवमुक्त कर दिया जाय। उपरोक्त संशोधित अर्थदण्ड की धनराशि अदा न करने पर उसे दो वर्ष का अतिरिक्त कारावास भुगतने के पश्चात कारागार से मुक्त किया जाये।

56. कार्यालय को निर्देश दिया जाता है कि विचारण न्यायालय का अभिलेख वापस भेज दिया जाय तथा इस आदेश की एक प्रतिलिपि संबंधित विचारण न्यायालय को अनुपालन हेतु तुरंत भेजना सुनिश्चित किया जाय।

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**(2024) 11 ILRA 251**
**APPELLATE JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 14.11.2024**

**BEFORE**

**THE HON'BLE RAJAN ROY, J.**
**THE HON'BLE OM PRAKASH SHUKLA, J.**

First Appeal No. 55 of 2021

**Dr. Bagish Kumar Mishra ...Appellant**
**Versus**
**Rinki Mishra ...Respondent**

**Counsel for the Appellant:**
Alok Tripathi, Anju Agarwal, Hari Om Pandey, Meena Bajpai, Nisha Srivastava, Shailesh Kumar Srivastava

**Counsel for the Respondents:**
C.S.C., Rajneesh Kumar Verma, Surya Prakash Singh

**Civil Law-The Hindu Marriage Act, 1955-Section 13 -The Family Court Act, 1984-Sections 19 & 28 -** The allegations with regard to cruelty as set out by the appellant/ husband are nothing but the normal wear and tear in married life. The couple lived together for around six years and the appellant-husband could not bring on record specific instances of mental harassment to enable the Court to adjudicate the case of mental cruelty in favour of the appellant/husband--- Allegations leveled by the husband are general and omnibus in nature which alone is not sufficient to grant a decree of divorce--- The instances of physical and mental harassment, as pleaded and asserted by the respondent/wife in her written St.ment, are on the better footing than those alleged by the appellant/husband. Petition for Domestic Violence has been allowed in favour of the respondent/wife, wherein she has even been awarded compensation and a monthly maintenance. This all goes on to show the contrary implication of the allegations made by the Appellant--- Pleadings of the appellant/husband are not so grave and weighty so as to dissolve the marriage.

**Appeal dismissed**. (E-15)

**List of Cases cited:**

Samar Ghosh Vs Jaya Ghosh : (2007) 4 SCC 511

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

(1) Heard Mrs. Nisha Srivastava, learned Counsel representing the appellant and Mr. Surya Prakash Singh, learned Counsel representing the respondent.

(2) This appeal under Section 19 read with Section 28 of the Family Courts Act, 1984 has been filed by the appellant/ husband, assailing the judgment and order dated 06.11.2020 passed by the Additional Principal Judge, Family Court, Faizabad, whereby Petition No. 773 of 2016 (Computer Registration No. 854 of 2019) filed by the appellant/ husband under Section 13 of the Hindu Marriage Act, 1955 seeking grant of a decree of divorce has been dismissed.

(3) The facts, in nutshell, are that appellant-Dr. Bagesh Kumar Mishra is the husband and respondent-Rinki Mishra is the wife. The matrimonial alliance was entered into between the parties as per Hindu rites and rituals in Devkali Temple Ayodhya on November 11, 2015.

(4) Appellant, Dr. Bagesh Kumar Mishra, had filed Petition No.773 of 2016 (Computer Registration No. 854 of 2019) under Section 13 of the Hindu Marriage Act, 1955 (hereinafter referred to as '**Act, 1955'**) before the Family Court, Ayodhya, alleging therein that he was subjected to

mental and physical cruelty by the respondent/wife with whom he married under coercion. It was the case of the appellant that while posted as Government Doctor at Community Health Centre, Pura Bazaar, Faizabad, he met the respondent in 2010. As he was new to Faizabad and was living alone, he engaged the respondent as a home Helper with the consent of her father, whereupon she confided to him about her family situation, narrating that her father was a chronic drinker; her mother was of bad character; and as such her education as well as that of her brother got disrupted. It has been further stated by the appellant that in the said peculiar family situation of the respondent/wife, he financially supported the education of respondent and her brother. The appellant and respondent were having a live-in-relationship. Appellant had also borne expenditure of her father's medical treatment, who eventually executed a 'Will' in favour of the respondent before his death on 15.10.2015.

(5) It was also the case of the appellant that after demise of respondent's father, dispute arose between the respondent and her mother over employment and financial benefits. On 08.11.2015, the respondent and her mother called the appellant at Devkali Temple and got him married with the respondent under pressure. This marriage got notorized in Civil Court, Faizabad on 09.05.2016 and was also got registered in the office of Registrar on 18.10.2016. It was the case of the appellant that after marriage, the respondent began imposing severe restrictions, forbidding him from visiting or supporting his parents and brothers and further humiliated him in front of hospital staff and patients by making baseless allegations about his relationships with colleagues and lodging false police complaints about he having gone missing whenever he was away from home.

(6) It was also the case of the appellant that the respondent had captured obscene images and videos of him, which were given to her brother, who then blackmailed the appellant with the manipulated materials, demanding money and threatening to publicly defame him. According to the appellant, the respondent had also physically assaulted him, dragged him by his hair, pushed him off the bed, and instigated her brother to attack him. Furthermore, the respondent and her family attempted to forcibly occupy a house under construction, which was being built by him with a loan. The respondent and her family had also pressurized the appellant to transfer ownership of the house in the respondent's name and obstructed the workers from continuing the construction. On 29th May 2016, at around 10:00 PM, an incident occurred, and the appellant reported it to the In-charge Officer of Devkali Outpost. On 12th June 2016, the respondent filed a false report at Kotwali Nagar Police Station, claiming that her husband (the appellant) was missing.

(7) It was also the case of the appellant that on 13th June 2016, at around 10:30 PM, the respondent fabricated a false incident, claiming that the appellant, along with two associates, forcefully opened her door and tried to establish physical relations with her. This allegation was reported to the Superintendent of Police (City), Faizabad, and was also published in various newspapers to defame the appellant publicly. Further, in the intervening night of 29/30th June 2016, at around 1:30 AM, the respondent made another false report through Dial No.100, accusing the

appellant of planning to murder her. Furthermore, a complaint was submitted by the respondent on 14th July 2016 to the Principal Secretary of Medical and Health Services, Uttar Pradesh, Lucknow, reiterating the false allegations. The respondent also submitted a complaint against the appellant to the Chief Medical Superintendent, Divisional Hospital, Darshan Nagar, on 22nd July 2016, branding him as a corrupt and immoral doctor, but the investigation revealed these claims to be baseless. On 2nd August 2016, respondent filed another complaint with the Women's Commission, Lucknow. The Respondent created a web of complaints against the Appellant, which caused immense mental harassment & cruelty. During this time, the appellant applied for his transfer to Lucknow due to his father suffering from paralysis and his brother being diagnosed with blood cancer. However, the respondent objected to his transfer request on 16th August 2016, though her objection was later dismissed.

(8) It is the further case of the appellant that on 2nd September 2016, the respondent falsely accused him by lodging an FIR (Crime No. 595/2016) under Sections 498A, 323, 504, 506, 377, 467, 468, and 313 of the Indian Penal Code at Kotwali Ayodhya, Faizabad. On 18th October 2016 and 2nd November 2016, the respondent filed applications with the Senior Superintendent of Police, stating that the police had taken no action in these cases. Facing these continued allegations and harassment, the appellant claims to have developed hypertension and heart disease. Appellant also asserted that on 9th November 2016, the respondent caused a disturbance at his house in Darshan Nagar and threatened him with severe consequences.

(9) Notice was issued in the aforesaid Divorce petition and in response, the respondent had put in appearance and filed a written statement, denying the allegations made in the petition. She stated that she got married with the appellant out of her own free will on 8th November 2015 at Devkali Temple, Faizabad, as per Hindu rituals. She refuted the appellant claims about conflicting marriage dates (8th November 2015 and 8th November 2016), accusing him of trying to mislead the Court. According to her, the couple had lived together as husband and wife for several years in Government quarters and rented houses. She also claimed that the appellant had repeatedly established physical relations with her by promising marriage and that, in the course of time, he had developed an illicit relationship with another woman, Aradhana Mishra, from Lucknow. The respondent alleged that the appellant tried to manipulate her into a divorce and even executed a marriage agreement on 9th May 2016 through an Advocate in Faizabad, deceitfully obtaining her signature on a separation agreement at the same time. Despite this, the appellant continued to harass and abuse her, including coercing her into unnatural sexual activities and engaging in other forms of exploitation. As a result, she filed FIR No. 595 of 2016 under Sections 498A, 323, 504, 506, 377, 467, 468, and 313 IPC. She also alleged that fearing arrest, the appellant registered their marriage on 18th October 2016 at the Sub-Registrar's office to pacify her and secured a compromise in the case. Following the marriage registration, the respondent withdrew her earlier complaint, but the appellant resumed his abusive behavior. Appellant filed a frivolous police complaint on 3rd March 2017, attempting to implicate her in a fake case. Upon discovering the truth, the

respondent submitted a request to the District Magistrate, Faizabad, seeking re-examination by a Medical Board, which the appellant allegedly tried to avoid. Respondent further alleged that on 20th February 2017, around 7 PM, the appellant forcibly evicted her from their house in Saketpuri, after which she called the police emergency number. The police detained the appellant, and a reconciliation attempt was made, during which the appellant issued a cheque for Rs. 5,000 (Cheque No. 010236, dated 22nd February 2017, drawn on Allahabad Bank, Devkali), however, the said cheque later bounced. The respondent also filed a case under Section 12 of the Domestic Violence Act, wherein during cross-examination, the appellant denied the validity of their marriage on 8th November 2015, but the respondent testified that they had lived together as husband and wife throughout. Respondent had accused the appellant of misleading the Court by falsely claiming that she resided in her parental home, while in fact, she had lived with him in rented accommodation and currently resides in his house i.e. House No. 344, at Saketpuri, Ayodhya. The respondent also filed Domestic Violence Case No. 2420/16 (Rinki Mishra vs. Dr. Bagesh Kumar Mishra), which was decided on 8th November 2017, wherein the Court found that the appellant had subjected the respondent to physical and mental abuse, constituting domestic violence. The trial Court awarded the respondent Rs. 1,00,000/- as lump-sum compensation, Rs.25,000/- per month as maintenance, and directed that she be allowed to reside without obstruction in the shared household at House No. 344, Saketpuri, Ayodhya. Additionally, the trial Court ordered the appellant to furnish a personal bond of Rs.50,000/- with an undertaking before the District Probation Officer, ensuring that he would not harass the respondent in future. The respondent stated that under no circumstances, she is willing to grant a divorce.

(10) Based upon the pleadings led by the parties, the issues framed by the trial Court are as under :-

1- क्या प्रत्यर्थी श्रीमती रिंकी मिश्रा द्वारा याची डाक्टर बागीश कुमार मिश्रा के साथ क्रूरता का व्यवहार किया गया है ?

2- याची डाक्टर बागीश कुमार मिश्रा किस अनुतोश को प्राप्त करने का अधिकारी है ?

(11) Parties led evidence before the trial Court. The appellant examined himself as P.W.1 by filing his affidavit as his examination-in-chief (marked as Paper No. 27Ka1), wherein he reiterated the plaint averments. Appellant also examined his friend, namely, Rajendra Kumar Gupta, as P.W.2, who filed affidavit as his examination-in-chief (marked as Paper No. 28Ka2), wherein he stated that he is a Doctor by profession and the plaintiff/appellant is also a Doctor, because of which, he used to visit the house of the appellant and also knew the conduct of the respondent with the appellant. According to the said witness, after marriage, when he went to house of the appellant, the respondent used to trouble the appellant on a number of times in front of him, saying that the appellant would not go to meet his father nor his father will come to meet him and the respondent restrained the appellant to meet him also. P.W.2 has also stated that the respondent also used abusive languages against the appellant on a number of times and also misbehaved with him.

(12) The respondent examined herself as O.P.W.1 by filing her affidavit as

her examination-in-chief (marked as Paper No. 44Ka2), wherein she reiterated the averments of the written statement. The respondent has also examined her mother, namely, Kamini Mishra, as O.P.W.2, who also filed her affidavit as her examination-in-chief (marked as Paper No. 51Ka2).

(13) The Family Court, after appraising the pleadings and evidence on record, has returned a finding that the parties had cordial relationship between 2010 to 2016 and the appellant filed the suit for divorce on 16.11.2016, therefore, in such a circumstances, it was difficult to understand as to when the respondent had inflicted mental, financial and physical cruelty against the appellant. In these backdrops, issue nos. 1 and 2 were decided against the appellant and the suit filed by him was also dismissed vide judgment and decree dated 06.11.2020, which is under challenge in the present appeal.

(14) Learned Counsel for the appellant has submitted that the respondent-wife has committed physical and mental cruelty by filing various complaints including false and frivolous criminal complaints against the appellant. According to the learned Counsel, though appellant has raised plea of cruelty at the hands of respondent by oral as well as by documentary evidence, but the learned Family Court has not considered the pleadings and the evidence on record, in its correct perspective. According to him, the Family Court has failed to consider the ill-treatment which was subjected to him by the respondent/wife. According to him, the very lodging of false allegations against the appellant/husband amounts to mental cruelty. He further submitted that the learned Family Court has ignored the bad habits of the respondent/wife, and also not considered that she used to quarrel with the appellant/husband in front of his friend and hospital staff. Lastly, he urged to allow the appeal in the interest of justice.

(15) Per contra, learned counsel for the respondent/wife, while supporting the judgment and decree of the trial Court, has submitted that the learned trial Court, while dismissing the petition, has properly appreciated the evidence on record and that the appellant/husband could not make out a case to interfere with the well-reasoned judgment of the trial Court.

(16) Having regard to the submission of the learned Counsel representing the appellant/husband and going through the record available before this Court in this appeal as well as the impugned judgment and decree and the record of the trial Court, the points of determination arise in consideration before us in the present appeal are as under :-

> "Whether the findings of the Family Court regarding issues no. 1 and 2 with respect to the plea of cruelty as a ground for divorce, is perverse and unsustainable thereby rendering the impugned judgment unsustainable ?"

(17) At the outset, it is readily available from records that the appellant/husband has sought divorce on the ground of mental and physical cruelty. Before adverting to examine the evidence on record to assess as to whether the appellant/husband could make out a case of mental, financial and physical cruelty, it would be advantageous to refer to one of the landmark judgments of the Hon'ble Supreme Court in the case of **Samar Ghosh vs. Jaya Ghosh** : (2007) 4 SCC 511

wherein the Apex Court have enumerated some instances of mental cruelty. The relevant portion in para no. 101 in the said judgment is reproduced below :-

> *"101. No uniform standard can ever be laid down for guidance, yet we deem it appropriate to enumerate some instances of human behavior which may be relevant in dealing with the cases of "mental cruelty". The instances indicated in the succeeding paragraphs are only illustrative and not exhaustive:*
>
> *(i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.*
>
> *(ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.*
>
> *(iv) Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.*
>
> *(v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.*
>
> *(ix) Mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day-to-day life would not be adequate for grant of divorce on the ground of mental cruelty.*
>
> *(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty."*

(18) A careful perusal of the pleadings and the evidence in support as adduced by the appellant/husband, would at once reveal that the allegations with regard to cruelty as set out by the appellant/husband, are nothing but the normal wear and tear in married life. The couple lived together for around six years and the appellant-husband could not bring on record specific instances of mental harassment to enable this Court to adjudicate the case of mental cruelty in favour of the appellant/husband. The allegations that she was quarreling with him without any reason, in the considered view of this Court, are not sufficient to form any opinion that the appellant/husband is undergoing acute mental pain, agony, suffering, disappointment and frustration and therefore it is not possible for him to live in the company of the respondent/wife.

(19) All the allegations levelled by the appellant/husband are general and omnibus in nature. The major allegation amongst them is with regard to her not permitting him to meet his parents and friends and regarding misbehaviour with

him in front of his friend and hospital staff and also having lodged frivolous complaints against the appellant, which alone is not sufficient to grant a decree of divorce. The complaints lodged by the respondent/wife had to be proved false and malicious by the Appellant, so as to meet the threshold of cruelty. On the contrary, the appellant/husband in his cross-examination has admitted that they had physical relations between 2013 to 2016. At this stage, it would be relevant to add that the suit for divorce was filed by the appellant only on 14.11.2016. The instances of physical and mental harassment, as pleaded and asserted by the respondent/wife in her written statement, are on the better footing than those alleged by the appellant/husband. This Court also finds that the petition for Domestic Violence has been allowed in favour of the respondent/wife, wherein she has even been awarded a compensation and a monthly maintenance. This all goes on to show the contrary implication of the allegations made by the Appellant.

(20) Further, it is the specific allegations of appellant/husband that on 29.05.2016 at about 10:00 p.m., the appellant was beaten by the respondent/wife and he sustained injuries. However, the learned trial Court has rightly observed that though number of cases have been lodged by the appellant/husband against his wife but the appellant/husband has not lodged any complaint/F.I.R. in regard to the incident alleged to have been occurred on 29.05.2016, which shows that the allegations made by the appellant/husband are doubtful.

(21) Apart from the aforesaid, it has rightly been held by the learned trial Court that the pleadings of the appellant/husband are not so grave and weighty so as to dissolve the marriage. The learned trial Court has rightly observed that the appellant has failed to prove his allegations of mental and physical cruelty.

(22) In view of the aforesaid, we are of the opinion that no case is made out by the appellant/husband to interfere with the well reasoned findings of the learned trial Court. The point of determination is answered accordingly.

(23) The appeal thus being devoid of merit deserves to be **dismissed** and is, accordingly, dismissed. The parties to bear their own costs.

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**(2024) 11 ILRA 257**
**APPELLATE JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 29.11.2024**

**BEFORE**

**THE HON'BLE RAJNISH KUMAR, J.**

Second Appeal No. 112 of 2023

**Rama Kant & Ors. ...Appellants**
**Versus**
**Smt. Prema Devi & Ors. ...Respondents**

**Counsel for the Appellants:**
Ashok Kumar Srivastava, Atul Kumar Srivastava

**Counsel for the Respondents:**
Sharad Pathak, Piyush Pathak, Vipul Tripathi

**Civil Law-The Specific Relief Act-1963-Section 16(c)-**Second appeal against concurrent judgment---Trial court in a suit for specific performance failed to frame the specific issue regarding readiness and willingness---It was incumbent upon the plaintiff-respondents to specifically St. in the plaint that they have arranged the remaining money of sale consideration and ready to pay the same and prove it---In a suit for specific performance, the

issue of readiness and willingness of the person claiming the relief of specific performance is required to be framed so that he may know that he has to prove the readiness and willingness to perform his part of contract and the other party may prove that the person claiming was not ready and willing to perform his part ---Courts below failed to consider the case in terms of provision made in Section 16(C) and the law on the point and allowed the suit filed by the plaintiff without appropriately analyzing the evidence and material on record, while recording the findings of readiness and willingness on the part of the plaintiff, the impugned judgments are not sustainable in the eyes of law.

**Second Appeal allowed**. (E-15)

**List of Cases cited:**

1. Jagjit Singh (D) Through LRs. Vs Amarjit Singh; 2018 (36) LCD 2787

2. Sukhwindar Singh Vs Jagroop Singh & ors.; AIR 2020 SC 4865

3. Shenbagam & ors. Vs K.K Rathinavel; (2022) SCC Online SC 71

4. P. Ravindranath & anr.Vs Sasikala & ors.(arising out of SLP (C) No.2246 of 2017); 2024 SCC OnLine SC 1749

5. Sukhbir Singh & ors. Vs Brij Pal Singh & ors.; (1997) 2 SCC 200

6. U.N. Krishnamurthy (since deceased) through LRs. Vs A.M. Krishnamurthy(Civil Appeal No.4703 of 2022); (2023) 11 SCC 775

7. Sugani (MST) Vs Rameshwar Das & anr.; (2006) 11 SCC 587

8. Rameshwar Prasad (dead) by LRS. Vs Basanti Lal; (2008) 5 SCC 676

9. Biswanath Ghosh (dead) by Legal Representatives & ors. Vs Gobinda Ghosh alias Gobindha Chandra Ghosh & ors.; (2014) 11 SCC 605

10. Kalyan Singh Chouhan Vs C.P. Joshi; (2011) 11 SCC 786

11. Dr. Om Prakash Rawal Vs Justice Amrit Lal Bahri; (1993) SCC Online HP 13

12. V.S. Ramakrishnan Vs P.M. Muhammad Ali (Civil Appeal Nos.8050-8051 of 2022); (2022) SCC OnLine SC 1545

13. Syed Dastagir Vs T.R. Gopalakrishna Shetty; (1999) 6 SCC 337

14. Gian Chand and Brothers & anr.Vs Rattan Lal @ Rattan Singh; 2013 2 SCC 606

15. Jaspal Kaur Cheema & anr.Vs Industrial Trade Links & ors.; (2017) 8 SCC 592

16. Prem Singh & ors. Vs Birbal & ors.; (2006) 5 SCC 353

(Delivered by Hon'ble Rajnish Kumar, J)

1. Heard, Shri G.S. Srivastava, Advocate holding brief of Shri Ashok Kumar Srivastava, learned counsel for the appellants and Sri Sharad Pathak, learned counsel for the respondents.

2. This second appeal under Section 100 of the Civil Procedure Code, 1908 (here-in-after referred as C.P.C.) has been filed assailing the judgment and decree dated 10.11.1987 passed in Regular Suit No.111 of 1984 (Shiv Nayak (dead) and Others Vs. Shiv Dularey (dead) and others) by the First Additional Civil Judge, Raibareli and judgment and decree dated 27.02.2023 passed in Civil Appeal No.11 of 1991 (Shiv Dularey (Dead) and Others Vs. Shiv Nayak (Dead) and Others) by the First Additional District Judge, Raibareli.

3. Learned counsel for the defendant-appellants, while assailing the two judgments passed by the courts below, submitted that the trial court in a suit for

specific performance of contract failed to frame the specific issue regarding readiness and willingness in terms of Section 16 (c) of The Specific Relief Act, 1963 (here-in-after referred as the Act of 1963). Even the lower appellate court ignored the aforesaid aspect and decided the appeal without framing points of determination, therefore, the appellants had filed Second Appeal No.205 of 1992 before this Court, which was allowed by means of the judgment and order dated 09.05.2022, whereby this Court had remanded the matter to the lower appellate court directing it to frame points of consideration and thereafter decide the appeal on merits. It was further argued that the lower appellate court despite the clear order of this Court, though, framed the points for determination but decided the case on the basis of already existing evidence and did not permit the parties to lead fresh evidence which is in violation of Order-41, Rule-25 C.P.C. apart from the fact that the opportunity of hearing has been lost to the appellant.

4. Learned counsel for the appellant had further submitted that the issue of readiness and willingness is absolutely imperative and without its compliance, the suit for specific performance of contract could not have been decreed apart from the fact that the defendant-appellants had also raised an objection that the agreement was an outcome of fraud. But no replication was filed. No evidence of payment of advance of Rs.200/- was adduced. Even otherwise, since the date of receipt of advance 06.10.1982 was mentioned in the plaint, therefore, without amendment in the plaint no evidence could have been adduced and accepted by the courts below contrary to the pleadings. He further submitted that the PW-2 has denied the payment of advance. PW-3 has also stated that the advance was not paid before him. The readiness and willingness has not been proved by any of the witnesses with the evidence of financial capacity of the plaintiff-respondents. There is also no correspondence in this regard prior to the notice and the notice was also not served and it was not in accordance with law.

5. He further submitted that even after remand, the provisions of Order 14 C.P.C. have not been complied and the impugned judgment and decree has been passed by the learned lower appellate court in violation of Order-41, Rule-25 C.P.C. without framing of the issue of readiness and willingness and proof thereof with the financial capacity, therefore, the decree for specific performance of contract could not have been passed. Thus, the learned counsel for the defendant-appellants submitted that the impugned judgment and decrees are not sustainable in the eyes of law and liable to be set-aside and the suit filed by the plaintiff-respondents is liable to be dismissed with cost.

6. Per contra, learned counsel for the plaintiff-respondents submitted that the predecessor-in-interest of the defendant-appellants had entered into an agreement for sale and executed the registered agreement after receiving advance of Rs.200/- out of the agreed sale consideration of Rs.50,000/-. The sale deed was to be executed within a period of one year after receipt of the remaining sale consideration. Despite repeated requests made by the predecessor-in-interest of the plaintiff-respondents, it was not executed, therefore, he gave a registered notice dated 27.08.1983 for performance of the contract disclosing his readiness and willingness to comply his part of the agreement. The

notice was deliberately returned because it has been admitted by the predecessor-in-interest of the defendant-appellants that he had heard that a notice was sent by predecessor-in-interest of the plaintiff-respondents but no reply to the notice was given, therefore, the suit for specific performance was filed disclosing therein the readiness and willingness of the plaintiff-respondents for performance of their part of the agreement to sale, which was not specifically denied. Though specific issue in regard to readiness and willingness was not framed but while considering the issue no.1, the trial court considered the issue recording that for specific performance of contract readiness and willingness to perform his part of contract by plaintiff is an essential element. Thus, the issue was considered by the trial court and after considering the pleadings and evidence available on record, the suit was decreed by means of the judgment and decree dated 10.11.1987. The same was challenged by the defendant-appellants in civil appeal before the lower appellate court and the lower appellate court, after remand from this court by the order passed in second appeal filed by the defendant-appellants, passed a fresh order in accordance with the direction issued by this court and framing the points for determination and confirmed the judgment and decree passed by the trial court. The lower appellate court dealt with the grounds raised by the defendant-appellants and also issue of readiness and willingness.

7. He further submitted that the specific pleadings in regard to the payment of advance of Rs.200/- and readiness and willingness of the plaintiff-respondents has not been specifically denied. Thus, the question of framing of issue under Order-14, Rule-1 C.P.C. does not arise. He further submitted that since there was no denial of specific pleadings, therefore, the same stands admitted under Order-8, Rule-3 and 4 C.P.C. There was no specific reply to the plea of readiness and willingness in para-6 of the plaint. He further submitted that the pleadings for specific performance are in conformity with Form-47 and 48 of Appendix- A C.P.C. The written statement is not as per Order-8, Rule-2 C.P.C. He further submitted that the plea of violation of Order-41, Rule-25 C.P.C. has already been turned down by this Court, by means of the order dated 31.07.2023, while admitting the appeal and formulating the substantial question of law, which is unchallenged. Thus, there is no illegality or infirmity in the impugned judgment and decrees. The appeal has been filed on misconceived and baseless grounds. The substantial question of law formulated in this appeal does not arise in this case and the appeal is liable to be dismissed with cost.

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

9. The suit for specific performance was filed by the predecessor-in-interest of the plaintiff-respondents Shiv Nayak (now dead) alleging therein that the predecessor-in-interest of the defendant-appellants Shiv Dulary (now dead) is the owner and in possession of plot nos.583mi./0-2-0, 312/1-2-8, 325/0-3-11, 326mi./0-5-6, 329/4-2-8, 574/0-2-13, 590/0-0-15, 580/0-6-2, 329/0-1-0 total measuring measuring 6 Bigha, 6 Biswa, 3 Biswansi situated in Village- Chilauli, Pargana- Inhauna, Tehsil- Maharajganj, District- Raibareli now Amethi as Bhumidhar. The predecessor-in-interest of the defendant-appellants Shiv Dularey

(now dead) executed a registered agreement for sale on 06.10.1982 after taking advance Rs.200/- in favour of the predecessor-in-interest of the plaintiff-respondents in village Chilauli for sale of the aforesaid plots in consideration of Rs.50,000/-. As per the terms and conditions of the agreement, the predecessor-in-interest of the plaintiff-respondents would arrange money within a year of the execution of the agreement and the predecessor-in-interest of the defendant-appellants would get the income tax clearance and thereafter he would execute the sale deed in favour of the plaintiff-respondents after receiving the remaining sale consideration. The plaintiff-respondents asked to the defendant-appellants for executing the sale deed after receiving the remaining sale consideration many times but he ignored the same, whereas the plaintiff-respondents were always ready and willing to get the sale deed executed in terms of the agreement and it is known to the defendant-appellants. The plaintiff-respondents gave a registered notice dated 27.08.1983 through their advocate to the defendant-appellants for executing the sale deed in accordance with the agreement, which was deliberately not received by the defendant-appellants. Consequently the suit was filed.

10. The predecessor-in-interest of the defendant-appellants filed a written statement admitting himself the owner and in possession of the aforesaid plots. He also admitted the execution of the agreement but contested the same on the ground that he is of 72 years old and he is not physically and mentally fit. In his family there are five members; his wife and two minor sons and two minor daughters, out of which except one daughter, all are unmarried and the source of livelihood of his family is only agricultural land and his whole family is dependent on it. It has further been stated that the defendant-appellants have neither made any agreement for sale in favour of the plaintiff-respondents nor received the advance of Rs.200/-. He further stated that the real maternal uncle of Shiv Nayak i.e. the plaintiff is Shiv Pratap and both are very rebellious and their terror is in the nearby area. Thakur Ram Singh of village-Pichauli, Police Station- Subeha, District-Barabanki was murdered on 07.10.1997, in which the aforesaid two and six others were convicted and punished with life imprisonment on 09.04.1979 by the Sessions Judge, Barabanki under Sections-147/148/149 and 302 I.P.C. During conviction the plaintiff Shiv Nayak threatened to the defendant to transfer his land to him otherwise he would have to face dire consequences. The plaintiff Shiv Nayak alongwith his maternal Uncle Shiv Pratap caught the defendant and took him to Tehsil- Maharajganj, District- Raibareli and with undue pressure got the agreement executed. They also threatened that if he would make any complaint to any officer, then his children would become orphan. Accordingly, it was stated that the agreement is illegal and it has been obtained with undue influence and he has never been given the advance and he has no intention to sale the land in dispute. It was also stated by the defendant-appellants that on account of terror of the plaintiff-respondents, he is residing in village- Nevli in District- Faizabad leaving the village-Chilauli and his family is managing agriculture from there. It was also stated that the cost of the land in dispute was Rs.1,000,00/- and it has been shown very less in the agreement. The father of the plaintiff-respondents Anant Ram had made forceful possession on one of the plots of

the defendant-appellants and keeping his animals on the same. On objection being raised he is being threatened. Thus, the suit is liable to be dismissed with cost.

11. On the basis of the pleadings of the parties, the following two issues were framed:-

*"1. क्या प्रतिवादी ने विक्रय हेतु कथित अनुबंध पत्र, जैसाकि वादोत्तर में कहा गया है, उत्पीड़ित होकर, हानि की अभित्रास से भयाक्रान्त होकर, अनुचित बल और प्रभाव में आकर तथा बिना किसी प्रतिफल के जिष्पादित किया? यदि हाँ तो इसका प्रभाव?*

*2. वादी गण किस अनुतोष का, यदि कोई हो, पाने के अधिकारी हैं?"*

12. While considering the issue no.1, the trial court recorded that for specific performance of agreement, an essential element is that the plaintiff was always ready and willing to perform the conditions of contract. Thereafter, after considering the pleadings of the parties and material on records came to the conclusion that the plaintiff-respondents had neither made any coercion on the defendant-appellants for execution of the agreement nor tried to harm nor it has been got written by force and influence. It is also established that the agreement was executed after payment of Rs.200/- as advance. The agreement was executed by defendant-appellants without any undue influence with free will in favour of the plaintiff-respondents and consequently, a direction can be issued to the defendant-appellants for performance of the contract. The suit was decreed by means of the judgment and decree dated 10.11.1987. The judgment and decree passed by the trial court was challenged in Civil Appeal No.11 of 1991. The civil appeal was allowed, by means of the judgment and decree dated 29.02.1992, confirming the aforesaid judgment and decree passed by the trial court. The said judgment and decree was challenged before this Court in Second Appeal No.205 of 1992; Shiv Dularey Vs. Shiv Nayak and Others. The second appeal was allowed by means of the order dated 09.05.2022 on the ground that appellate court has failed to frame the questions for consideration and has further failed to take into consideration the evidence of the case. The matter was remanded back to the lower appellate court for deciding it a fresh on merits in accordance with law after taking into consideration each and every points of consideration with regard to the case and evidence of the same. In deference to the order passed by this Court, the lower appellate court decided civil appeal filed by the defendant-appellants by means of the impugned judgment and decree dated 27.02.2023. Hence, this second appeal has been filed which has been admitted on the following substantial question of law.

*"Whether the two Courts were justified in decreeing the suit for specific performance of contract without considering the issue of readiness and willingness which is sine qua non for the grant of decree?"*

13. For considering the aforesaid substantial question of law, Section-16(c) of the Act of 1963 is required to be considered. For ready reference, the same is extracted here-in-below:-

***16. Personal bars to relief.—Specific performance of a contract cannot be enforced in favour of a person—***

*(a) .....*

*(b) .....*

*(c) [who fails to prove] that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant.*

*Explanation.—For the purposes of clause (c),—*

*(i) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court;*

*(ii) the plaintiff [must prove] performance of, or readiness and willingness to perform, the contract according to its true construction.*

14. In view of the aforesaid Section-16(c) of Act of 1963, specific performance of a contract can not be enforced without proof by the person, who claims it that he has performed or has always been ready and willing to perform essential terms of the contract which are to be performed by him, other than the terms of performance of which has been prevented or waived by the defendant. The Explanation-1 to clause (C) provides that where a contract is for payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in the court any money except without an order of the court. According to the Explanation-2 to clause (C) the plaintiff must prove performance of, or readiness and willingness to perform, the contract according to its true construction. Thus, a decree of specific performance of contract can not be passed unless the person, who prays for a decree for specific performance of contract, proves that he has performed or always ready and willing to perform the essential terms and conditions of the contract, which were to be performed by him, therefore, it is sine qua non for grant of a decree of specific performance of contract. It has to be determined on the basis of entirety of facts, relevant circumstances and the intention and conduct of the parties and financial capacity of the party.

15. The Hon'ble Supreme Court, in the case of **Jagjit Singh (D) Through LRs. Vs. Amarjit Singh; 2018 (36) LCD 2787**, has held that it is settled law that a plaintiff who seeks specific performance of contract is required to plead and prove that he was always ready and willing to perform his part of the contract. The relevant paragraph-4 is extracted here-in-below:-

*"4. It is settled law that a plaintiff who seeks specific performance of contract is required to plead and prove that he was always ready and willing to perform his part of the contract1. Section 16(c) of the Specific Relief Act mandates that the plaintiff should plead and prove his readiness and willingness as a condition precedent for obtaining relief of grant of specific performance. As far back as in 1967, this Court in Gomathinayagam Pillai and Ors. v. Pallaniswami Nadar2 held that in a suit for specific performance the plaintiff must plead and prove that he was ready and willing to perform his part of the contract right from the date of the contract*

*up to the date of the filing of the suit. This law continues to hold the field and has been reiterated in the case of J.P. Builders and Anr. v. A. Ramadas Rao and Anr.3 and P. Meenakshisundaram v. P. Vijayakumar & Ors.4. It is the duty of the plaintiff to plead and then lead evidence to show that the plaintiff from the date he entered into an agreement till the stage of filing of the suit always had the capacity and willingness to perform the contract."*

16. The Hon'ble Supreme Court, in the case of **Sukhwindar Singh Vs. Jagroop Singh and Others; AIR 2020 SC 4865**, has held that the suit being the one for specific performance of the contract on payment of the balance sale consideration, the readiness and willingness was required to be proved by the plaintiff and was to be considered by the Courts below as a basic requirement if a decree for specific performance is to be granted.

17. The Hon'ble Supreme Court, in the case of **Shenbagam and Others Vs. K.K Rathinavel; (2022) SCC Online SC 71**, has held that Section 16 of the Specific Relief Act provides certain bars to the relief of specific performance. These include, inter alia, a person who fails to aver and ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented and waived by the defendant. It has further been held that in evaluating whether the respondent was ready and willing to perform his obligations under the contract, it is not only necessary to view whether he had the financial capacity to pay the balance consideration, but also assess his conduct throughout the transaction. The "readiness" refers to whether he was financially capable of paying the balance consideration. It has also been held that the decree of specific performance is discretionary relief and in deciding whether to grant the remedy of specific performance, specifically in suits relating to suits of immovable property, the courts must be cognizant of the conduct of the parties, the escalation of the price of the suit property, and whether one party will unfairly benefit from the decree and the remedy provided must not cause injustice to a party, specifically when they are not at fault.

18. The Hon'ble Supreme Court, in the case of **P. Ravindranath and Another Vs. Sasikala and Others(arising out of SLP (C) No.2246 of 2017); 2024 SCC OnLine SC 1749**, has held that relief of specific performance of contract is a discretionary relief. As such, the Courts while exercising power to grant specific performance of contract, need to be extra careful and cautious in dealing with the pleadings and the evidence in particular led by the plaintiffs. Section 16 of the Act of 1963 requires the readiness and willingness to be pleaded and proved by the plaintiff in a suit for specific performance of contract. The said provision has been widely interpreted and held to be mandatory.

19. The Hon'ble Supreme Court, in the case of **Sukhbir Singh and Others Vs. Brij Pal Singh and Other; (1997) 2 SCC 200**, has held that law is not in doubt and it is not a condition that the respondents should have ready cash with them. It is sufficient for the respondents to establish

that they had the capacity to pay the sale consideration.

20. Similar views have been taken by the Hon'ble Supreme Court, in the cases of **U.N. Krishnamurthy (since deceased) through LRs. Vs. A.M. Krishnamurthy(Civil Appeal No.4703 of 2022); (2023) 11 SCC 775, Sugani (MST) Vs. Rameshwar Das and Another; (2006) 11 SCC 587, Rameshwar Prasad (dead) by LRS. Vs. Basanti Lal; (2008) 5 SCC 676 and Biswanath Ghosh (dead) by Legal Representatives and Others Vs. Gobinda Ghosh alias Gobindha Chandra Ghosh and Others; (2014) 11 SCC 605.**

21. The Hon'ble Supreme Court, in the case of **Kalyan Singh Chouhan Vs. C.P. Joshi; (2011) 11 SCC 786**, has held that the object of framing issues is to ascertain/shorten the area of dispute and pinpoint the points required to be determined by the court. The issues are framed so that no party at the trial is taken by surprise. It is the issues fixed and not the pleadings that guide the parties in the matter of adducing evidence. The court should not decide a suit on a matter/point on which no issue has been framed. Similar view has been taken by a coordinate bench of the Himachal Pradesh High Court in the case of **Dr. Om Prakash Rawal Vs. Justice Amrit Lal Bahri; (1993) SCC Online HP 13**.

22. The Hon'ble Supreme Court, in the case of **V.S. Ramakrishnan Vs. P.M. Muhammad Ali (Civil Appeal Nos.8050-8051 of 2022); (2022) SCC OnLine SC 1545**, has held that though there was no specific issue framed by the learned Trial Court on readiness and willingness on the part of the plaintiff, the Trial Court has given the findings on the same and has non-suited the plaintiff by observing that the plaintiff was not having sufficient funds to make the full balance consideration on or before 12.01.2006. Such a finding could not have been given by the learned Trial Court without putting the plaintiff to notice and without framing a specific issue on the readiness and willingness on the part of the plaintiff. The relevant paragraph 8 is extracted here-in-below:-

> *"8. Now the findings and the reasoning given by the learned Trial Court refusing to pass a decree for specific performance is concerned it appears that though there was no specific issue framed by the learned Trial Court on readiness and willingness on the part of the plaintiff, the Trial Court has given the findings on the same and has non-suited the plaintiff by observing that the plaintiff was not having sufficient funds to make the full balance consideration on or before 12.01.2006. Such a finding could not have been given by the learned Trial Court without putting the plaintiff to notice and without framing a specific issue on the readiness and willingness on the part of the plaintiff. There must be a specific issue framed on readiness and willingness on the part of the plaintiff in a suit for specific performance and before giving any specific finding, the parties must be put to notice. The object and purpose of framing the issue is so that the parties to the suit can lead the specific evidence on the same. On the aforesaid ground the judgment and order passed by the learned Trial Court dismissing the suit and refusing to*

*pass the decree for specific performance of the agreement to sell confirmed by the High Court deserves to be quashed and set aside and the matter is to be remanded to the learned Trial Court to frame the specific issue with respect to the readiness and willingness on the part of the plaintiff. On remand the parties be permitted to lead the evidence on the readiness and willingness on the part of the plaintiff to perform his part of the contract, more particularly, whether the plaintiff was ready and willing to pay the full consideration and whether the plaintiff was having sufficient funds and/or could have managed the balance sale consideration."*

23. In view of above, in a suit for specific performance of contract, the issue of readiness and willingness of the person claiming the relief of specific performance of contract is required to be framed so that he may know that he has to prove the readiness and willingness to perform his part of contract and the other party may prove that the person claiming was not ready and willing to perform his part of contract, however the issues can be framed on the basis of pleadings of the parties.

24. Learned counsel for the plaintiff-respondents had also submitted that the pleadings in the plaint were in accordance with the Form No.47 and 48 of C.P.C. in which, the formats of pleadings of suit for specific performance has been given. According to the Form No.47, it is to be stated that the plaintiff has applied to the defendant specifically to perform the agreement on his part, but the defendant has not done so and the plaintiff has been and still is ready and willing specifically to perform the agreement on his part of which the defendant has had notice. It is further required to be pleaded that the plaintiff claims that the Court will order the defendant specifically to perform the agreement and to do all acts necessary to put the plaintiff in full possession of the said property [or to accept a transfer and possession of the said property] and to pay the costs of the suit. As per Form No.48, it is to be stated that the plaintiff is still ready and willing to pay the purchase-money of the said property to the defendant and the plaintiff claims that the defendant transfers the said property to the plaintiff by a sufficient instrument following the terms of the agreement. Thus the plaintiff has to plead his readiness and willingness to perform his part of contract. It is also noticed here that Form No.13 of appendix A regarding the written statement provides for defence for the suit for specific performance, according to which it is to be pleaded in the written statement that the plaintiff has not performed which of the conditions and as to whether the plaintiff has been guilty of delay, fraud or misrepresentation and as to whether the agreement is unfair or entered into by mistake.

25. The Hon'ble Supreme Court, in the case of **Syed Dastagir Vs. T.R. Gopalakrishna Shetty; (1999) 6 SCC 337**, has dealt with

the pleadings to be made with reference to Section 16 (c) of the Specific Relief Act. The relevant paragraph-9, 11 and 12 are extracted here-in-below:-

*"9. So the whole gamut of the issue raised is, how to construe a plea specially with reference to Section 16(c) and what are the obligations which the plaintiff has to comply with in reference to his plea and whether the plea of the plaintiff could not be construed to conform to the requirement of the aforesaid section, or does this section require specific words to be pleaded that he has performed or has always been ready and is willing to perform his part of the contract. In construing a plea in any pleading, courts must keep in mind that a plea is not an expression of art and science but an expression through words to place fact and law of one's case for a relief. Such an expression may be pointed, precise, sometimes vague but still it could be gathered what he wants to convey through only by reading the whole pleading, depending on the person drafting a plea. In India most of the pleas are drafted by counsel hence the aforesaid difference of pleas which inevitably differ from one to the other. Thus, to gather true spirit behind a plea it should be read as a whole. This does not distract one from performing his obligations as required under a statute. But to test whether he has performed his obligations, one has to see the pith and substance of a plea. Where a statute requires any fact to be pleaded then that has to be pleaded maybe in any form. The same plea may be stated by different persons through different words; then how could it be constricted to be only in any particular nomenclature or word. Unless a statute specifically requires a plea to be in any particular form, it can be in any form. No specific phraseology or language is required to take such a plea. The language in Section 16(c) does not require any specific phraseology but only that the plaintiff must aver that he has performed or has always been and is willing to perform his part of the contract. So the compliance of "readiness and willingness" has to be in spirit and substance and not in letter and form. So to insist for a mechanical production of the exact words of a statute is to insist for the form rather than the essence. So the absence of form cannot*

*dissolve an essence if already pleaded.*

*11. Section 16(c) of the Specific Relief Act, 1963 is quoted hereunder:*

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*It is significant that this explanation carves out a contract which involves payment of money as a separate class from Section 16(c). Explanation (i) uses the words "it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court". (emphasis supplied) This speaks in a negative term what is not essential for the plaintiff to do. This is more in support of the plaintiff that he need not tender to the defendant or deposit in court any money but the plaintiff must [as per Explanation (ii)] at least aver his performance or readiness and willingness to perform his part of the contract. This does not mean that unless the court directs the plaintiff cannot tender the amount to the defendant or deposit in the Court. The plaintiff can always tender the amount to the defendant or deposit it in court, towards performance of his obligation under the contract. Such tender rather exhibits the willingness of the plaintiff to perform his part of the obligation. What is "not essential" only means need not do but does not mean he cannot do so. Hence, when the plaintiff has tendered the balance amount of Rs 120 in court even without the Court's order it cannot be construed adversely against the plaintiff under Explanation (i). Hence, we do not find any merit in the submission of the learned counsel for the respondents.*

*12. In interpreting a pleading wherever there be two possible interpretations, then the one which defeats justice should be rejected and the one which subserves to justice should be accepted."*

26. The Order-8, Rule-1 C.P.C. provides for written statement of his defence by the defendant. Rule-2 provides that the defendant must raise all grounds of defence as, if not raised, would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the plaint, as, for instance, fraud, limitation, release, payment, performance or facts showing illegality. Rule-3 provides that it shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff, but the defendant must deal specifically with each allegation of fact of which he does not admit the truth, except damages. Rule 4

provides that the denial should not be evasive. Rule-5 (1) provides that every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability. However, as per proviso the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission. Sub rule (2) of Rule 5 provides that where the defendant has not filed a pleading, the court may pronounce judgment on the basis of the facts contained in the plaint, except as against a person under a disability, but the Court may require any such fact to be proved. Thus, the defence in the written statement should be specific and it should not be evasive.

27. The Hon'ble Supreme Court, in the case of **Gian Chand and Brothers and Another Vs. Rattan Lal alias Rattan Singh; 2013 2 SCC 606**, has held that Rules 3, 4 and 5 of Order VIII form an integral code dealing with the manner in which allegations of fact in the plaint should be traversed and the legal consequences flowing from its non-compliance. It is obligatory on the part of the defendant to specifically deal with each allegation in the plaint and when the defendant denies any such fact, he must not do so evasively but answer the point of substance.

28. The Hon'ble Supreme Court, in the case of **Jaspal Kaur Cheema and Another Vs. Industrial Trade Links and Others; (2017) 8 SCC 592**, has held that a defendant is required to deny or dispute the statements made in the plaint categorically, as evasive denial would amount to an admission of the allegation made in the plaint in terms of Order 8 Rule 5 of the Code.

29. Rule-1 of Order-XIV of C.P.C provides about framing of issues. Sub-rule (1) provides that issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other. Sub-rule (5) provides that at the first hearing of the suit the Court shall, after reading the plaint and the written statements, if any, and after examination under rule 2 of Order X and after hearing the parties or their pleaders, ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend, therefore the issues are required to be framed at the first hearing of the suit on the basis of the pleadings made in the plaint and the written statement on which right decision of the case appears to depend. Rule 2 (1) of Order-XIV provides that notwithstanding that a case may be disposed of on a preliminary issue, the Court shall, subject to the provisions of sub-rule (2), pronounce judgment on all issues. Sub Rule (2) of Rule 2 provides the order in which the issues may be decided. Rule 3 of order XIV provides as to from what material, the issues may be framed. Rule 4 order XIV provides that the court may examine witnesses or documents before framing issues. Rule-5(1) of Order-XIV provides that the Court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the matters in controversy between the parties shall be so made or framed. Sub Rule (2) of Rule 5 of the Order XIV provides that the Court may also, at any time before passing a decree, strike out any issues which may be wrongly framed or introduced. In view of above, after filing of

plaint and written statement, the Court has to frame the issues on which the parties are at variance in their pleadings, as per the procedure provided in Order-XIV of C.P.C., which are required to be decided.

30. Adverting to the facts of the case, the trial court, after recording the aforesaid essential element of specific performance of contract and considering the pleadings and evidence on record and averments in paragraph-6 of the plaint and on the basis of the notice dated 27.08.1993, held that plaintiff-respondents has always been ready and willing to get the sale deed executed of the land mentioned in paragraph-1 of the plaint. The same was also proved by the plaintiff-respondent no.1 Shiv Nayak Mishra through his evidence stating that in pursuance of the agreement executed by the defendant-appellant, he and his brother are ready for the execution of sale deed in their favour, which has not been denied by the defendant-appellants. The only plea has been taken that the agreement was got executed through undue influence and coercion and threatening, however, the same could not be proved. The trial court, thereafter considering the pleadings, evidence and material on record, considered as to whether the agreement to sale was executed as stated by the defendant-appellants or not, came to the conclusion that the agreement to sale was executed by the defendant-appellants without undue influence and threat with his sweet will.

31. The lower appellate court, after remand of the matter by this Court, framed four points of determinations, which are extracted here-in-below:-

*"1- क्या प्रतिवादी ने विक्रय करार दिनांकित-06-10-1982 बिना स्वतन्त्र सम्मति के निष्पादित किया है?*

*2 क्या वादीगण संविदा के विनिर्दिष्ट अनुपालन हेतु तैयार व तत्पर रहे हैं?*

*3- क्या वादीगण विक्रय करार दिनांकित 06.10.1982 में उल्लिखित सम्पत्ति का प्रतिवादी से बैनामा करा पाने के अधिकारी हैं?*

*4. क्या विद्वान अवर न्यायालय द्वारा पारित किया गया प्रश्नगत निर्णय पत्रावली पर उपलब्ध साक्ष्य के विपरीत है?"*

32. This Court, while formulating the aforesaid substantial question of law, held that in the instant appeal, the issue of readiness and willingness, whether it has been pleaded and proved in accordance with law is the only question that arises for consideration. In so for as the submissions made by the learned counsel for the appellant that no fresh evidence was permitted in terms of Order-41, Rule-25 C.P.C is concerned, the same is misconceived for the reason that from the perusal of the judgment and order dated 09.05.2022, the appellate court merely directed the lower appellate court to frame the points for determination, it did not permit any framing of fresh issues in pursuance whereof fresh evidence was required, therefore, turning down the submissions made by the learned counsel for the appellant in this regard, the appeal was admitted on the aforesaid sole substantial question of law. The said order has not been challenged by the appellant. Thus, the issue raised in regard to the opportunity of evidence after framing of the issue of readiness and willingness thereon is misconceived and not tenable.

33. In view of above, though no issue of readiness and willingness for specific performance of agreement was framed by trial court, however the same was dealt by the trial court and the appellate court, on remand by this Court,

decided the appeal after making the said point of determination and considered the issue, therefore, it is to be examined by this Court as to whether it has rightly been considered by the courts below or not.

34. The perusal of the record indicates that the plaintiff-respondents has stated in paragraph-2 of the plaint that the defendant-appellants had executed the agreement for sale for consideration of Rs.50,000/- after receiving Rs.200/- as advance on 06.10.1982 and got it registered. In paragraph-3 it has been stated that it was agreed between the parties that the plaintiff-respondents would arrange the money for sale deed within a year and the defendant-appellants Income Tax Clearance. In paragraph-4 it has been stated that the plaintiff-respondents, time and again, requested to the defendant-appellants to execute the sale deed after receiving the remaining sale consideration but they avoided, therefore, as stated in paragraph-5 a registered notice dated 27.08.1983 was sent through an advocate. In paragraph-6 it has been stated that the plaintiff-respondents are ready to get the sale deed executed on the basis of the agreement to sale dated 06.10.1982 but the defendant-appellants are avoiding the same. Thus, the pleadings does not indicate that the plaintiff-respondents have arranged the money and they are ready to pay the same, though in the notice dated 27.08.1983 it was stated that the plaintiff-respondents have arranged the money. This suit was filed after more than a year of the aforesaid notice dated 31.10.1984, therefore, in view of the aforesaid discussions and law on the issue, it was incumbent upon the plaintiff-respondents to specifically state in the plaint that they have arranged the remaining money of sale consideration and ready to pay the same and prove it. Though specific reply to the same has not been given in written statement. However paragraph-4 has been denied. Even otherwise, he is not entitled for any benefit of weakness of case of defendant-appellants.

35. Perusal of the evidence adduced by the predecessor-in-interest of the plaintiff-respondents Shiv Nayak, who appeared as PW-1 also does not indicate that he has arranged the money and having the same and ready to pay the same to the defendant-appellants. In regard to readiness and willingness to comply his part in terms of the agreement to sale by the plaintiff-respondents, no evidence has been adduced by other witnesses. The notice dated 27.08.1983 was not served and no other correspondence was made by the plaintiff-respondents during one year of agreement or thereafter. Even otherwise, the aforesaid notice does not indicate that any place or time was indicated for compliance. However, without considering the aforesaid pleadings, material and evidence on record, the trial court only on the basis of above notice dated 27.08.1983, which was not served on the defendant-appellants, held that he was ready and willing to perform his part in the agreement. This Court is of the view that no such finding could have been recorded.

36. The learned lower appellate court initially dismissed the civil appeal filed by the defendant-appellants confirming the judgment and decree passed by the trial court without framing the point of determination (consideration) in the appeal. However, after remand of the matter by this Court in the second appeal filed by the defendant- appellants, made the aforesaid points of determination and considered the same on the basis of

pleadings and evidence on record. Even after considering the same the learned lower appellate court failed to consider the aforesaid pleadings, material and evidence on record and only relying on the findings recorded by the trial court dismissed the appeal and confirmed the judgment and decree passed by the trial court. Thus, this Court is of the view that the court's below have failed to consider the case in terms of provision made in Section 16(C) of the Act of 1963 and the law on the point and allowed the suit filed by the plaintiff-respondents without appropriately considering and analyzing the evidence and material on record, while recording the findings of readiness and willingness on the part of the plaintiff-respondents. Thus, the impugned judgments are not sustainable in the eyes of law.

37. It is also noticed that though the pleading was made by the plaintiff-respondents in the plaint that the agreement to sale was executed by the predecessor-in-interest of the defendant-appellants after receiving Rs.200/- as advance on 06.10.1982 but in the evidence adduced before the trial court he stated that Rs.200/- was paid by him on 05.10.1982 when the parties had agreed for sale of the land in dispute in a consideration of Rs.50,000/-. Therefore, the evidence in regard to the advance paid by the plaintiff-respondents is contrary to the pleading, which can not be accepted as per law. Other witnesses of plaintiff-respondents have also either denied or shown ignorance about payment of advance. No other evidence of payment of advance has been adduced.

38. It is also noticed that the allegation of the defendant-appellants is that the predecessor-in-interest of the plaintiff-respondents Shiv Nayak and his maternal uncle Shiv Pratap are rebellious person and got the agreement to sale executed by undue influence and coercion on the threat of gun. Shiv Nayak has admitted in his evidence that he went to the house of his maternal uncle Shiv Pratap in the evening of 05.10.1982 to ask him that tomorrow he has to come to Maharajganj and he reached their directly. The witness of the plaintiff-respondents have shown their ignorance as to whether the predecessor-in-interest of the plaintiff-respondents and his maternal uncle had gun with them at the time when the agreement to sale was executed or not. Thus, the allegation of the defendant-appellants also does not seem to be without any basis.

39. The Hon'ble Supreme Court, in the case of **Prem Singh and Others Vs. Birbal and Others; (2006) 5 SCC 353**, has held that there is a presumption that a registered document is validly executed and a registered document, therefore, prima facie would be valid in law. The onus of proof, thus, would be on a person who leads evidence to rebut the presumption. However, in a case of specific performance of contract/agreement, merely registration of an agreement does not give right for a direction for performance unless the readiness and willingness is shown and proved, which the plaintiff-respondents have failed to do in this case. Even otherwise as discussed above, the same also does not seem to have been validly executed.

40. In view of above and considering the over all facts and circumstances of the case and section 99 C.P.C., this Court is of the view that the impugned judgment and decrees are not sustainable in the eyes of law and liable to be set-aside. Since there is no proof of

payment of Rs.200/-, therefore, the question of refund also does not arise.

41. The Second Appeal No.112 of 2023 is **allowed** with cost. The impugned judgment and decree dated 10.11.1987 passed in Regular Suit No.111 of 1984 (Shiv Nayak (dead) and Others Vs. Shiv Dularey (dead) and others) by the First Additional Civil Judge, Raibareli and judgment and decree dated 27.02.2023 passed in Civil Appeal No.11 of 1991 (Shiv Dularey (Dead) and Others Vs. Shiv Nayak (Dead) and Others) by the First Additional District Judge, Raibareli are hereby set aside.

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**(2024) 11 ILRA 273**
**APPELLATE JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 23.11.2024**

**BEFORE**

**THE HON'BLE RAJNISH KUMAR, J.**

Second Appeal No. 227 of 2005

**Ishtiyak Ali ...Appellant**
**Versus**
**Shiv Raj ...Respondent**

**Counsel for the Appellant:**
Mohd. Arif Khan, Anurag Kr. Srivastav, M Muneshwar Sultan, Sridhar Awasthi

**Counsel for the Respondents:**
Pankaj Kumar Srivastava, S.C. Srivastava

**Civil Law-The Code of Civil Procedure,1908-Order 41 - Rule 27-** Additional evidence can be filed in the appellate court in three contingencies. The first of which is that where the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; secondly the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not be produced before passing of the decree and thirdly if the appellate court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause---The additional evidence sought to be produced by the defendant is required to be taken on record for the just decision of the case and pronouncement of the judgment because it will have to be considered as to whether the suit was filed by material concealment of fact and the decree was obtained by playing fraud on the court which can be considered at any stage, if comes to light and the suit can be dismissed on this ground alone because no relief can be granted in such case and as to whether the suit could have been filed on behalf of the Custodian, Enemy Property without his permission or authority.

**Application under Order 41 Rule 27 CPC allowed**. (E-15)

**List of Cases cited:**

1. North Eastern Railway Administration, Gorakhpur Vs Bhagwan Das (D) LRS; AIR 2008 Supreme Court 2139

2. Uttaradi Mutt Vs Raghavendra Swamy Mutt; (2018) 10 SCC 484

3. H.S.Goutham Vs Rama Murthy & anr.; (2021) 5 SCC 241

4. Satish Kumar Gupta & ors. Vs St. of Har. & ors.; (2017) 4 SCC 760

5. Sanjay Kumar Singh Vs St. of Jharkhand; (2022) 7 SCC 247

6. A. Andisamy Chettiar Vs A.Subburaj Chettiar; (2015) 17 SCC 713

7. Jagdish Prasad Patel (Dead) through legal representatives & anr.Vs Shivnath & ors.; (2019) 6 SCC 82

8. Union of India Vs Ibrahim Uddin & anr.; (2012)8 SCC 148

9. Nattha Singh & ors. Vs The Financial Commissioner, Taxation, Punjab & ors.; (1976) 3 SCC 28

10. Basant Kumar Mehrotra Vs Ram Laxman Janki Virajman Mandir; 2018 (36) LCD 1094

11. Jai Narain Pandey and after him Ram Bilas Pandey Vs Lallan Tiwari & ors.; 1972 SCC OnLine All 258.

(Delivered by Hon'ble Rajnish Kumar, J)

1. Heard, Shri Sudeep Seth, learned Senior Advocate assisted by Shri Sridhar Awasthi, learned counsel for the plaintiff-appellant and Shri Pankaj Srivastava, learned counsel for the defendant-respondent.

2. The instant Second Appeal has been filed for setting aside the judgment and decree dated 26.02.2005 passed in Civil Appeal No.33 of 2004; Shiv Raj Versus Ishtiyak Ali by the Additional District Judge, Court No.1, Unnao, by means of which the appeal has been allowed with costs and the judgment and decree dated 30.04.2004 passed by the trial court has been set aside. The further prayer has been made for decreeing the suit with costs.

3. Learned counsel for the plaintiff-appellant submitted that the plaintiff-appellant had filed a suit for permanent injunction. He is the owner/Bhumidhar and in possession of Araji No.1390, Gram-Rasoolpur Balia, Pargana-Mohan, Tehsil-Hasanganj, District-Unnao. The said land is in two parts Ka and Kha. Part Ka is in the ownership of the plaintiff-appellant and his co-sharers, but since they were living out therefore they were not impleaded in the suit and the suit was filed for their benefit also. He is the exclusive owner of part Ka. The plaintiff-appellant had placed on record Khasra and Khatauni and other records, which are sufficient to prove the ownership of the plaintiff-appellant and identifiability of the land in dispute, therefore, even if the area was not disclosed by the plaintiff-appellant, it would not have made any difference. Admittedly the defendant-respondent is the owner and in possession of the adjacent plot No.1386, therefore, he has no concern with the Plot No.1390. The suit was decreed by the trial court after considering the pleadings, evidence and material on record. The defendant-respondent had filed an appeal. The appeal has wrongly and illegally been allowed without considering the pleadings, evidence and material on record and the provisions of Order 7 Rule 3 of Civil Procedure Code, 1908 (here-in-after referred as CPC), therefore this Second appeal is liable to be allowed and the suit filed by the plaintiff-appellant is liable to be decreed.

4. Per contra, learned counsel for the defendant-respondent submitted that the learned trial court had failed to consider that the plaintiff-appellant had not given the area in possession of the plaintiff-appellant because the defendant-respondent is in possession of some portion of Gata No.1390, whereas it was the duty of the plaintiff-appellant to get the property identified, which was not done and the learned trial court had allowed the suit without considering it and evidence on record. The learned lower appellate court has rightly and in accordance with law allowed the appeal because the area in ownership and possession of the plaintiff-appellant and the co-sharers has not been given and the same was not got identified. He further submitted that the suit filed by

the plaintiff-appellant suffers from material concealment of fact because two of the sisters of the plaintiff-appellant, namely, Smt. Azmat Ahsan and Kudrat Ahsan alias Nadrtula Momina and co-sharers and having 1/8 share each in entire plots had gone to Pakistan, settled there and acquired citizenship of Pakistan near about 1961-62. Therefore, their share vested in Custodian of Enemy Property of India in the year 1966 as enemy property, but this fact was not disclosed. The defendant-respondent, after coming to know about it and obtaining the relevant documents has filed an application under Order 41 Rule 27(1) (aa) of CPC (C.M. Application No.06/2022) for taking those on record as additional evidence.

5. He further submitted that the defendant-respondent has filed the Notification dated 10th of September 1965, according to which the immovable property in India belonging to or held by or managed on behalf of all Pakistan National vested in the Custodian of Enemy Property for India with immediate effect and the details of the properties of Azmat Ahsan and Kudrat Ahsan alias Nadrtula Momina which have vested in the Custodian of Enemy Property as annexures No.A-1 and A-2 to the aforesaid application. He further submitted that coming to know about the same it has been recorded in the revenue records also and in proof thereof the Khatauni of 1428-1433 Fasali have been annexed with the application. He further submitted that the Assistant Custodian of Enemy Property, Lucknow has directed to the District Magistrate/Ex Officio Deputy Custodian (Enemy Property), District-Unnao (U.P.) by means of letter dated 30.01.2019 to take the custody of the property of Pakistani citizens, namely, Azmat Ahsan and Nudrat Ahsan @ Nudarutul Momina daughters of Late Ehtiram Ali situated in Gram -Rasoolpur Vakiya, Pargana-Mohan, Tehsil-Hasanganj, District-Unnao. He also submitted that after coming to know about the aforesaid orders the plaintiff-appellant filed a suit for partition before the Sub Divisional Officer, Hasanganj, District-Unnao impleading his aforesaid sisters, who had become Pakistani Citizens as respondent no.1 and 2 and also on behalf of one Bibi Farhat Ahsan, who had already died. However the suit has been withdrawn after filing of the aforesaid application by the defendant-respondent as disclosed by the plaintiff-appellant in the supplementary affidavit, but the aforesaid conduct indicates that the plaintiff-appellant has neither only concealed the material fact in these proceedings but is also in the habit of concealing the material facts and obtaining the decrees, orders by concealment of material facts and misleading the court. Thus the submission is that the documents filed by the defendant-respondent may be taken on record and the appeal and the suit may be dismissed on the ground of material concealment of facts.

6. Learned counsel for the plaintiff-appellant submitted that the application under Order 41 Rule 27 CPC filed by the defendant-respondent is misconceived and not tenable and liable to be dismissed. The application for additional evidence can be allowed only if the additional evidence sought to be adduced removes the cloud of doubt over the case and the evidence has a direct and important bearing on the main issue in the suit and interest of justice clearly renders it imperative that it may be allowed and permitted to be taken on record. The application cannot be allowed to fill in lacunae or to patch up weak points in the

case. He further submitted that the defendant-respondent has not succeeded on the issue of non-joinder of necessary parties i.e. co-owners, but no appeal has been filed challenging the same and now he wants to raise this issue through application under Order 41 Rule 27 CPC, therefore it is misconceived and not tenable. The present Second Appeal is to be decided on the basis of the pleadings in the plaint, the written statement and evidence on record regarding description of land in dispute, on which two substantial questions of law have been formulated and this court cannot travel beyond that. The additional evidence sought to be brought on record has no concern with the substantial questions of law formulated in this appeal. The substantial questions of law formulated in this appeal do not require the additional evidence sought to be produced by the defendant-respondent. Even otherwise the defendant-respondent has failed to establish that the evidence, which is sought to be brought on record was not within the knowledge or could not be produced by him despite exercise of due diligence before the trial court. That too when the documents sought to be placed on record by way of additional evidence are public documents and were in public domain. Thus the submission is that the application under Order 41 Rule 27 CPC is liable to be dismissed and the appeal is liable to be decided on the substantial questions of law formulated by this court.

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

8. This appeal was admitted on the following substantial questions of law:-

(1) Whether the description of the land in dispute was necessary when the appellant had mentioned the plot number? And

(2) Whether the appellate court is justified in allowing the respondent's appeal and dismissing the appellant-plaintiff's suit for permanent injunction on the ground of unidentifiability of the land in dispute?

9. The Suit for permanent injunction was filed by the plaintiff-appellant claiming title and possession over Gata No.1390 as Bhumidhar, situated at Gram Rasoolpur Valiya, Pargana-Mohan, Tehsil-Hasanganj, District-Unnao. The said plot is alleged to have two parts 1390-Ka and 1390-Kha, out of which part Ka is in the ownership of the plaintiff-appellant alongwith other co-owners, therefore, it was filed for the benefit of those co-owners also. He is the exclusive owner of part Kha. The suit was contested by filing the written statement denying the averments made in the plaint. Thereafter issues were framed and the evidence was adduced by the parties. The suit was decreed by the trial court. Being aggrieved the appeal was filed by the defendant-respondent, which has been allowed on the ground that the plaintiff-appellant has failed to show the area of the plot, therefore, the land in dispute is unidentifiable. Hence this Second appeal has been filed.

10. The defendant-respondent has filed an application under Order 41 Rule 27 CPC on the ground that the suit was filed by the plaintiff-appellant on behalf of the co-sharers also in regard to the part of the land in dispute, alleging that the disputed plot No.1390 of Khata No.22 is in two parts i.e. 1390-Ka and 1390-Kha, situated in village-Rasoolpur Valiya, Pargana-Mohan, Tehsil-Hasanganj, District-Unnao.

There are 8 co-bhumidhars/co-sharers in Khata No.1390-Ka including appellant, two brothers and five daughters of Ehhatram Ali. Out of the said co-owners, two daughters, namely, Smt.Azmat Ahsan and Kudrat Ahsan alia Nadrtula Momina having 1/8 share each in the entire plots including said plot of Khata No.22 have gone to and settled in Pakistan in the year 1961-62 and acquired citizenship of Pakistan.

11. The Government of India issued Notification No.12/2/65-E dated 10.09.1965 in exercise of Power conferred by Sub Rule(1) of Rule 133-V of the Defence of India Rules, 1962 by which all immovable property in India belonging to or held by or managed on behalf of all Pakistani Nationals shall vest in the Custodian of Enemy property of India with immediate effect. In pursuance of the said Notification the 1/8 share out of immovable property of entire plots of Khata No.22 including plot no.1390-Ka of Smt. Ajmat Ahsan and Kudrat Ahsan alias Nadrtula Momina have been declared as enemy property and vested in the Custodian of Enemy Property of India in the year 1966 because they had acquired the citizenship of Pakistan. Accordingly the properties as disclosed from Sl.No.18 to 88 in the list of immovable enemy property contained in annexure no.A-2 had vested in the Custodian, but without disclosing it, the names of all the co-sharers were got recorded in the revenue records. The plaintiff-appellant alongwith co-sharers illegally sold the shares in the enemy properties by concealing the fact of enemy property and on coming to know, the office of Assistant Custodian, Enemy Property wrote a letter dated 30.01.2019 to the District Magistrate/Ex-Officio Deputy Custodian informing him that the properties and shares of Smt. Ajmat Ahsan and Kudrat Ahsan alias Nadrtula Momina have been declared as Enemy properties in the year 1966 and accordingly it had vested in the Custodian and it remains in its custody under Section 5 of the Enemy Property Act, 1968, therefore, the control of the same may be taken and in the revenue records Custodian Enemy Property against their names be got recorded. In pursuance thereof the necessary incorporation has been made in the revenue records after the order of the competent authority.

12. A complaint was made by one of the relatives, namely, Ehtesham Imtiyaz Ali of the plaintiff-appellant for making an inquiry and cancellation of sale deeds and ensuing the possession of the Enemy properties on 20.02.2021. In pursuance thereof a letter dated 17.03.2021 was written by the Assistant Custodian, Enemy Property to the District Magistrate/Ex-Officio Deputy Custodian (Enemy Property), district-Unnao for making an inquiry in the matter and protection of the enemy properties of the said Pakistani nationals. The plaintiff-appellant filed a suit for partition under Section 116 of the U.P. Revenue Code 2006 alongwith co-sharers arraying the aforesaid Smt. Ajmat Ahsan and Kudrat Ahsan alias Nadrtula Momina as respondents no.1 and 2 concealing the fact that they became Pakistani citizens, whereas they have died in the year 2009 and 2010. Therefore, in pursuance of the aforesaid complaint made by the relative of the plaintiff-appellant, a letter dated 17.03.2021 was written to the aforesaid District Magistrate for effective Pairvi of the case in the case pending before the Sub Divisional Officer. It has also been disclosed by the defendant-respondent that the applicant no.3 Ifthar Ali alias Ikitiya Ali son of Munshi Akhtar Ali in the said suit has also died, therefore the suit was on

behalf of a dead person also. A perusal of the copy of the partition suit annexed as Annexure no.7 to the application indicates that it has been admitted in paragraph 2 of the application that the respondents no.1 and 2 i.e. the aforesaid two sisters of the plaintiff-appellant have 1/8 share each.

13. The application under Order 41 Rule 27 CPC has been contested by the plaintiff-appellant by filing an objection alleging therein that the defendant-respondent has failed to establish that the said evidence was not within his knowledge or could not be produced by him despite due diligence before the trial court because the alleged documents were in public domain and it cannot be said by defendant-respondent that they were not within their knowledge at the time when the suit was decreed. It has also been alleged that the averments of the defendant-respondent that 1/8 share each in plot no.1390-Ka vested in the Custodian, Enemy Property came to his knowledge on the complaint of Ehtesham Imtiyaz Ali is only a patch up work to fill the lacunae. It has also been alleged that the plea of non-joinder of necessary parties has already been dealt with by the trial court as well as by the first appellate court and decided against the defendant-respondent, therefore, now he cannot rake up the issue before this court because he has not filed any appeal challenging the same. The judgment in this Second Appeal is to be pronounced on the basis of issues involved in the appeal, on which two substantial questions of law have been formulated and the additional evidence sought to be brought on record does not have the direct and important bearing on the main issue in the suit and the application is liable to be dismissed. However no specific reply to the aforesaid pleas of the defendant-respondent in regard to settlement of the aforesaid two sisters in Pakistan, their death and enemy properties etc. have not been given. 14. The reply to the objection has been filed. Thereafter a supplementary affidavit has been filed by the plaintiff-appellant annexing copy of the order dated 12.10.2022 passed by the Sub Divisional Officer, Hasanganj, Unnao, by means of which the suit filed by the plaintiff-appellant and others under Section 116 of the U.P. Revenue Code 2006 has been allowed to be withdrawn on an application moved by him on 21.09.2022.

15. The suit filed by the plaintiff-appellant was decreed by means of judgment and decree dated 30.04.2024. The appeal was allowed by the Lower Appellate Court by means of judgment and decree dated 26.02.2005. The documents annexed by the defendant-respondent alongwith his application under Order 41 Rule 27 CPC except annexures no.1 and 2, which are of subsequent date, could not have been in the knowledge of the defendant-respondent. So far as annexure No.2 is concerned, the date and time on it is 05.09.2022 at 11.30 A.M., which may be date of printing. The annexure no.1 is the Notification dated 12 September 1965 issued in General, which does not disclose the specific properties, therefore, the contention of learned counsel for the plaintiff-appellant that the defendant-respondent has failed to show the due diligence for obtaining the said documents is misconceived and not tenable.

16. Order 41 Rule 27 CPC provides for production of additional evidence in appellate court, which is extracted here-in-below:-

> ***"27. Production of additional evidence in Appellate Court***
>
> *(1) The parties to an appeal shall not be entitled to*

*produce additional evidence, whether oral or documentary, in the Appellate Court. But if--*

*(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or*

*1[(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or]*

*(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined.*

*(2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission."*

17. According to the aforesaid provision additional evidence can be filed in the appellate court in three contingencies. The first of which is that where the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; secondly the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not be produced before passing of the decree and thirdly if the appellate court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause. Therefore this court has to see as to whether the party seeking to produce additional evidence was diligent in producing the evidence or not or whether any document is required for pronouncement of judgment or for any other substantial cause the said evidence is required and there is sufficient cause for taking the additional evidence on record.

18. The Hon'ble Supreme Court, in the case of **North Eastern Railway Administration, Gorakhpur Versus Bhagwan Das (D) LRS; AIR 2008 Supreme Court 2139**, has held that in any event, had the court found the additional documents, sought to be admitted, necessary to pronounce the judgment in the appeal, in a more satisfactory manner, it would have allowed the application and, if not, the application would have been dismissed. It has also been observed that it is true that a judgment or decree by the first court or by the highest court obtained by playing fraud on the court is a nullity and non est in the eyes of law.

19. The Hon'ble Supreme Court, in the case of **Uttaradi Mutt Versus Raghavendra Swamy Mutt; (2018) 10 SCC 484**, provided the procedure to be followed by the appellate court after granting permission to produce the additional evidence is granted. There are two options available to the appellate court. First it may record the evidence itself by permitting the parties to produce evidence before it as per Rule 27 of Order 41 CPC or direct the court from whose decree the appeal under consideration has arisen, to do so.

20. The Hon'ble Supreme Court, in the case of **H.S.Goutham Versus Rama**

**Murthy and another; (2021) 5 SCC 241**, has held that unless and until the procedure under Order 41 Rule 27, 28 and 29 is followed, the parties to the appeal cannot be permitted to lead additional evidence and/or the appellate court is not justified to direct the court from whose decree the appeal is preferred or any other subordinate court, to take such evidence and to send it when taken to the appellate court.

21. The Hon'ble Supreme Court, in the case of **Satish Kumar Gupta and others Versus State of Haryana and others; (2017) 4 SCC 760**, has held that the additional evidence cannot be permitted to fill in the lacunae or to patch up the weak points in the case.

22. The Hon'ble Supreme Court, in the case of **Sanjay Kumar Singh Versus State of Jharkhand; (2022) 7 SCC 247**, has held that where the additional evidence is sought to be adduced removes the cloud of doubt over the case and the evidence has a direct and important bearing on the main issue in the suit and interest of justice clearly renders it imperative that it may be allowed to be permitted on record, such application may be allowed.

23. The Hon'ble Supreme Court, in the case of **A. Andisamy Chettiar Versus A.Subburaj Chettiar; (2015) 17 SCC 713**, has held that admissibility of additional evidence does not depend upon the relevancy to the issue on hand, or on the fact, whether the applicant had an opportunity for adducing such evidence at an earlier stage or not, but it depends upon whether or not the appellate court requires the evidence sought to be adduced to enable it to pronounce judgment or for any other substantial cause. It has further been observed that the true test, therefore is, whether the appellate court is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced.

24. The Hon'ble Supreme Court, in the case of **Jagdish Prasad Patel (Dead) through legal representatives and another Versus Shivnath and others; (2019) 6 SCC 82**, has held that the application under Order 41 Rule 27 CPC for production of additional evidence, whether oral or documentary, cannot be allowed if the appellant was not diligent in producing the relevant documents in the lower court. However, in the interest of justice and when satisfactory reasons are given, the court can receive additional documents.

25. The Hon'ble Supreme Court, in the case of **Union of India Versus Ibrahim Uddin and another; (2012)8 SCC 148**, has held that where the additional evidence sought to be adduced removes the cloud of doubt over the case and the evidence has a direct and important bearing on the main issue in the suit and interest of justice clearly renders it imperative that it may be allowed to be permitted on record, such application may be allowed. The Hon'ble Supreme Court has also held that the provision does not apply, when on the basis of the evidence on record, the appellate court can pronounce a satisfactory judgment. The matter is entirely within the discretion of the court and is to be used sparingly. The words "for any other substantial cause" must be read with the word "requires" in the beginning of the sentence, so that it is only where, for any other substantial cause, the appellate court requires additional evidence. The relevant paragraphs 36, 38, 41, 48, 49 and 51 are extracted here-in-below:-

" 36. The general principle is that the

appellate court should not travel outside the record of the lower court and cannot take any evidence in appeal. However, as an exception, Order 41 Rule 27 CPC enables the appellate court to take additional evidence in exceptional circumstances. The appellate court may permit additional evidence only and only if the conditions laid down in this Rule are found to exist. The parties are not entitled, as of right, to the admission of such evidence. Thus, the provision does not apply, when on the basis of the evidence on record, the appellate court can pronounce a satisfactory judgment. The matter is entirely within the discretion of the court and is to be used sparingly. Such a discretion is only a judicial discretion circumscribed by the limitation specified in the Rule itself. (Vide K. Venkataramiah v. A. Seetharama Reddy [AIR 1963 SC 1526] , Municipal Corpn. of Greater Bombay v. Lala Pancham [AIR 1965 SC 1008] , Soonda Ram v. Rameshwarlal [(19 75) 3 SCC 698 : AIR 1975 SC 479] and Syed Abdul Khader v. Rami Reddy [(1979) 2 SCC 601 : AIR 1979 SC 553] .)

38. Under Order 41 Rule 27 CPC, the appellate court has the power to allow a document to be produced and a witness to be examined. But the requirement of the said court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment. This provision does not entitle the appellate court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. It does not entitle the appellate court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only for removing a lacuna in the evidence that the appellate court is empowered to admit additional evidence. (Vide Lala Pancham [AIR 1965 SC 1008] .)

41. The words “for any other substantial cause” must be read with the word “requires” in the beginning of the sentence, so that it is only where, for any other substantial cause, the appellate court requires additional evidence, that this Rule will apply e.g. when evidence has been taken by the lower court so imperfectly that the

appellate court cannot pass a satisfactory judgment.

48. To sum up on the issue, it may be held that an application for taking additional evidence on record at a belated stage cannot be filed as a matter of right. The court can consider such an application with circumspection, provided it is covered under either of the prerequisite conditions incorporated in the statutory provisions itself. The discretion is to be exercised by the court judicially taking into consideration the relevance of the document in respect of the issues involved in the case and the circumstances under which such an evidence could not be led in the court below and as to whether the applicant had prosecuted his case before the court below diligently and as to whether such evidence is required to pronounce the judgment by the appellate court. In case the court comes to the conclusion that the application filed comes within the four corners of the statutory provisions itself, the evidence may be taken on record, however, the court must record reasons as on what basis such an application has been allowed. However, the application should not be moved at a belated stage.

49. An application under Order 41 Rule 27 CPC is to be considered at the time of hearing of appeal on merits so as to find out whether the documents and/or the evidence sought to be adduced have any relevance/bearing on the issues involved. The admissibility of additional evidence does not depend upon the relevancy to the issue on hand, or on the fact, whether the applicant had an opportunity for adducing such evidence at an earlier stage or not, but it depends upon whether or not the appellate court requires the evidence sought to be adduced to enable it to pronounce judgment or for any other substantial cause. The true test, therefore is, whether the appellate court is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced. Such occasion would arise only if on examining the evidence as it stands the court comes to the conclusion that some inherent lacuna or defect becomes apparent to the court. (Vide Arjan Singh v. Kartar Singh [1951 SCC 178 :

> AIR 1951 SC 193] and Natha Singh v. Financial Commr., Taxation [(1976) 3 SCC 28 : AIR 1976 SC 1053] .)
>
> 51. In *Arjan Singh v. Kartar Singh* [1951 SCC 178 : AIR 1951 SC 193] this Court held : (AIR pp. 195-96, paras 7-8)
>
> "7. … If the additional evidence was allowed to be adduced contrary to the principles governing the reception of such evidence, *it would be a case of improper exercise of discretion, and the additional evidence so brought on the record will have to be ignored and the case decided as if it was non-existent. ...*
>
> 8. … The order allowing the appellant to call the additional evidence is dated 17-8-1942. The appeal was heard on 24-4-1942. There was thus no examination of the evidence on the record and a decision reached that the evidence as it stood disclosed a lacuna which the court required to be filled up for pronouncing its judgment." (emphasis added)"

26. Similar view has been taken by the Hon'ble Supreme Court, in the case of **Nattha Singh and others Versus The Financial Commissioner, Taxation, Punjab and Others; (1976) 3 SCC 28** and Coordinate Benches of this court in the cases of **Basant Kumar Mehrotra Versus Ram Laxman Janki Virajman Mandir; 2018 (36) LCD 1094 and Jai Narain Pandey and after him Ram Bilas Pandey Versus Lallan Tiwari and others; 1972 SCC OnLine All 258.**

27. Adverting to the facts of the present case, this court finds that the plaintiff-appellant had filed a suit for permanent injunction on his behalf and on behalf of co-sharers and for their benefit also without disclosing that his two sisters, namely, Smt. Ajmat Ahsan and Kudrat Ahsan alias Nadrtula Momina, who were also co-sharers of 1/8th each, have migrated to Pakistan, settled there and adopted the citizenship of Pakistan. The reply to the application under Order 41 Rule 27 CPC also indicates that plaintiff-appellant has not stated that they have not left India for Pakistan and not became Pakistani citizens, whereas the documents sought to be placed on record by way of additional evidence indicates that they had went to Pakistan and became Pakistani citizens prior to 1966, when their shares had been declared enemy property and vested in Custodian, Enemy Properties of India and they died about 9-10 years back.

28. The evidence adduced by the plaintiff-appellant before the trial court also indicates that he has stated that they live in Lucknow, whereas their children are working in Bangladesh, therefore they used to go to Bangladesh, therefore not only there was concealment but the plaintiff-appellant also made false statement and mislead the court. The plea of the defendant-respondent is also that they have died about 9-10 years back and it has not been denied, therefore, it stands admitted. Even then he filed a suit for partition before

the Sub Divisional Officer and it has been withdrawn only after the application under Order 41 Rule 27 CPC was moved before this court, therefore, the suit for partition was also filed with concealment and against the dead persons. Thus it appears that the plaintiff-appellant is in habit of concealment of facts before the court of law.

29. Learned counsel for the plaintiff-appellant, on a query being made to him, had stated that if the sisters of the plaintiff-appellant have went to Pakistan and their shares have been vested in Custodian, Enemy Property, he would be only the co-sharer and suit can be filed by one of the co-sharers.

30. In view of above, this court is of the view that the additional evidence sought to be produced by the defendant-respondent is required to be taken on record for the just decision of the case and pronouncement of the judgment because it will have to be considered as to whether the suit was filed by material concealment of fact and the decree was obtained by playing fraud on the court which can be considered at any stage, if comes to light and the suit can be dismissed on this ground alone because no relief can be granted in such case and as to whether the suit could have been filed on behalf of the Custodian, Enemy Property without his permission or authority. Therefore the application under Order 41 Rule 27 CPC filed by the defendant-respondent is liable to be allowed and the additional evidence annexed with the same are liable to be taken on record and an additional substantial question of law arises, which is to be formulated.

31. In view of above, the C.M. Application No.06 of 2022 filed under Order 41 Rule 27 C.P.C. is allowed and the documents annexed therewith as Annexure No.A-1 to A-7 are taken on record. The following substantial question of law is formulated besides the two substantial questions of law formulated by this court, by means of order dated 23.05.2005:-

> "(iii) Whether the suit for permanent injunction filed by the plaintiff-appellant suffers from material concealment of facts and liable to be dismissed on this ground?"

32. List on 28th of November, 2024 for further hearing.

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**(2024) 11 ILRA 284**
**APPELLATE JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 12.11.2024**

**BEFORE**

**THE HON'BLE ATTAU RAHMAN MASOODI, J.**
**THE HON'BLE SUBHASH VIDYARTHI, J.**

Special Appeal Defective No. 601 of 2024

**State of U.P. & Ors. ...Appellants**
**Versus**
**Shivani Singh ...Respondent**

**Counsel for the Appellants:**
C.S.C.

**Counsel for the Respondent:**
Sudhir Singh Raghuvanshi

**Allahabad High Court Rules-Chapter VIII Rule 5-U.P. Revenue Code,2006-Section 67(a)-U.P. Zamindari Abolition and Land Reforms Act,1950-Section 123(1)-quashing of disciplinary proceedings initiated against the respondent(a Deputy Collector)-respondent was issued a charge-sheet and a supplementary charge-sheet during her tenure as Sub-**

**Divisional Magistrate-the charges alleged negligence, procedural violations, and illegal orders favoring private individuals at the cost of public property-the respondent was found guilty in the inquiry report dated 03.08.2024-Held-Disciplinary proceedings against public officials exercising judicial or quasi-judicial powers are permissible when there is evidence of misconduct, negligence or malafide intent-The single judge erred in quashing the charge-sheets without examining the evidence or providing the State an opportunity to file a response-The appellants are directed to conclude the disciplinary proceedings against the respondent in furtherance of the chargesheets issued against the respondent and enquiry report dated 03.08.2024 expeditiously.(Para 1 to 36)** (E-6)

**List of Cases cited:**

1. Zunjarro Bhikaji Nagarkar Vs U.O.I. & ors. (1999) 7 SCC 409

2. Abhay Jain Vs HC of Raj. (2022) 13 SCC 1

3. U.O.I. Vs Duli Chand (2006) 5 SCC 680

4. U.O.I. Vs K.K. Dhawan (1993) 2 SCC 56

5. Govt. of T.N. Vs K.N. Ramamurty (1997) 7 SCC 101

6. Ramesh Chander Singh Vs HC of Alld. & anr.(2007) 4 SCC 247

7. Anjali Chaurasiya Vs St. of U.P. (2023) SCC OnLine All 3185

8. Hari Om Rastogi Vs St. of U.P. (2022) SCC Online All 2305

9. Ministry of Defence Vs Prabhash Chandra Mirdha (2012) 11 SCC 565

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

**C.M. Application No.1 of 2024 (Application for condonation of delay in filing the Special Appeal)**

1. Heard Sri Anand Kumar Singh, the learned Standing Counsel appearing for the appellants - State of U.P. & its Officers and Sri Ratnesh Chandra, the learned counsel for the sole respondent.

2. Vakalatnama filed on behalf of the sole respondent by Sri Ratnesh chandra, Advocate is taken on record.

3. The instant intra-Court Appeal filed by the State is delayed by 53 days as on 07.11.2024.

4. The appeal is accompanied with an application seeking condonation of delay supported by an affidavit. In the affidavit filed in support of the delay condonation application, we find that just and plausible reasons have been disclosed by the applicants-appellants seeking condonation of delay.

5. In absence of any objection and the explanation offered being bona fide, the application for condonation of delay is allowed and the delay in filing the appeal is condoned.

6. The appeal may be assigned a regular number.

**Order on memo of Special Appeal**

7. By means of the instant intra-Court Appeal filed under Chapter VIII Rule 5 of the Allahabad High Court Rules, the appellants have challenged the validity of a judgment and order dated 08.08.2024 passed by an Hon'ble Single Judge of this

Court in Writ A No.6001 of 2024, whereby a charge-sheet dated 08.09.2022 and a supplementary charge-sheet dated 29.11.2022 issued against the respondent have been quashed and the Inquiry Officer has been mandated not to proceed further in pursuance of the aforesaid charge sheet and the supplementary charge-sheet.

8. Briefly stated, facts of the case are that the respondent was appointed as a Deputy Collector in the year 2015 and by means of an order dated 23.10.2021, she was posted as Sub-Divisional Magistrate/Deputy Collector, Tehsil Tiloi, District Amethi. An Office Memorandum dated 16.07.2022 placed her under suspension in contemplation of departmental disciplinary proceedings. The Commissioner, Ayodhya Division, Ayodhya was appointed as Inquiry Officer as to conduct inquiry against the respondent. Upon a representation dated 05.08.2022 submitted by the respondent, the Inquiry Officer was changed and Commissioner, Prayagraj Division, Prayagraj was appointed the Inquiry Officer.

9. On 08.09.2022, the Inquiry Officer issued a charge-sheet containing as many as eleven charges against the respondent. A supplementary charge-sheet containing two additional charges was issued to her on 29.11.2022.

10. An office memorandum dated 29.05.2023 was issued during pendency of the enquiry whereby her suspension was revoked in furtherance of a representation dated 03.03.2023.

11. Charge Nos.1 to 10 related to the numerous suits for declaration under Section 144 of the U.P. Revenue Code, 2006, some of which had been decided without issuing the mandatory 60 days' notice to the State/Gaon Sabha under Section 80 C.P.C. and Section 106 Panchayati Raj Adhiniyam, through some suits Banjar Lands or Naveen Parti Lands were declared to have vested in certain private individuals on the basis of their illegal possession against the relevant legal provisions and evidence in order to provide undue benefit to them, in some cases public utility lands vesting in the State were recorded in the revenue records as Bhoomidhari Land of certain private individuals, in some cases Forest land was recorded in the name of private individuals in illegal occupation thereof and numerous cases were decided without hearing the version of the State/Gaon Sabha, against the evidence on record and established legal position, in a clandestine manner after coming into direct contact with the litigants outside the Courts and, thus, illegal orders were passed by recording wrong facts in order to provide benefit to the claimants, thereby causing loss of public property.

12. The first charge in the supplementary charge-sheet was that the respondent had misused her position and the judicial process for granting undue benefit to the various persons, without hearing the version of the State Government in as many as 34 cases under Section 67 (a) of U.P. Revenue Code, 2006 / Section 123 (1) U.P. Zamindari Abolition and Land Reforms Act, 1950. The second supplementary charge against the respondent was that she had allotted numerous Abadi sites in favour of various ineligible persons named in the charge.

13. The respondent had filed the writ petition seeking quashing of the aforesaid charge-sheet dated 08.09.2022 and supplementary charge-sheet dated

29.11.2022, on 29.07.2024. On 01.08.2024, the learned Counsel for the State of U.P. was granted time to seek instructions on the point that if any charge-sheet has been issued without jurisdiction and the charges are non est in the eyes of law as to how such charge-sheet may be issued against the petitioner. Thereafter the Writ Petition was listed on 08.08.2024, when it was allowed, without giving an opportunity to the opposite parties to file a counter affidavit and only after giving an opportunity to seek instructions regarding a limited ground, as aforesaid.

14. Relying upon the decisions of the Hon'ble Supreme Court in the cases of **Zunjarrao Bhikaji Nagarkar v. Union of India & Ors.**, (1999) 7 SCC 409 and **Abhay Jain v. High Court of Rajasthan**: (2022) 13 SCC 1, the Writ Court held that a person exercising judicial or quasi-judicial powers may not be subjected to a departmental trial if there is any error in any order passed by the authority. If a judicial or a quasi-judicial authority is subjected to departmental trial for his orders, he/she may be afraid of passing orders. It is recorded in the judgment dated 08.08.2024 that as per instructions provided to the learned Standing Counsel, the orders in question passed by the respondent had been recalled.

15. While assailing the aforesaid order, Shri Anand Kumar Singh, the learned Standing Counsel has submitted that the Writ Court has not appreciated relevant legal position in its correct perspective. **Zunjarrao Bhikaji Nagarkar (Supra)** was decided by a Bench consisting of two Hon'ble Judges of the Hon'ble Supreme Court by placing reliance upon some earlier judgments. The learned Standing Counsel has placed reliance on a subsequent three Judge Bench in the case of **Union of India v. Duli Chand:** (2006) 5 SCC 680, wherein the Hon'ble Supreme Court referred to an earlier three Judge Bench in the case of **Union of India v. K. K. Dhawan**: (1993) 2 SCC 56, wherein it was noted that the view that no disciplinary action could be initiated against an Officer in respect of judicial or quasi-judicial functions, was wrong.

16. The learned Standing Counsel further submitted that the enquiry against the respondent already stands concluded and Enquiry Officer – Commissioner, Prayagraj Division, Prayagraj has prepared his report on 03.08.2024, but as the same had not been received by the State Government till the instructions were sent to the learned Additional Chief Standing Counsel in furtherance of the order dated 01.08.2024 passed by the Writ Court, the same could not be placed before the writ Court.

17. A copy of the enquiry report dated 03.08.2024 has been annexed with the Special Appeal, which shows that the respondent has participated in the enquiry proceedings. The respondent has been found to have decided cases in great haste – in some cases, within 12 days, without following the mandate of the substantive as well as the procedural law, negligently and in bad faith, thereby causing loss to the State. In one case, she delivered her judgment after keeping the same reserved for more than 4 months, whereas normally reserved judgments are to be delivered within 1 month. Charges no. 1 to 9 and supplementary charges no. 1 and 2 have been proved and it has been found that the respondent was guilty.

18. Charge no. 11 has been partially proved and although it has been found that the respondent has decided as many as 17 Regular Suits under Section

144 of the U.P. Revenue Code within 12 to 43 days without following the procedure laid down by law in a manifestly negligent manner, it could not be proved that the respondent had contacted the beneficiaries and had obtained any illegal advantage from them. Charge no. 10 has not been proved. As the charge-sheet and the supplementary charge-sheet have been quashed, no action can be taken against the respondent in spite of the fact that she has been found guilty of numerous charges.

19. It was held in **K. K. Dhawan** (Supra) that: -

> ***"28****. Certainly, therefore, the officer who exercises judicial or quasi-judicial powers acts negligently or recklessly or in order to confer undue favour on a person is not acting as a Judge. Accordingly, the contention of the respondent has to be rejected. It is important to bear in mind that in the present case, we are not concerned with the correctness or legality of the decision of the respondent but the conduct of the respondent in discharge of his duties as an officer. The legality of the orders with reference to the nine assessments may be questioned in appeal or revision under the Act. But we have no doubt in our mind that the Government is not precluded from taking the disciplinary action for violation of the Conduct Rules. Thus, we conclude that the disciplinary action can be taken in the following cases:*
>
> ***29. Where the officer had acted in a manner as would reflect on his reputation for integrity or good faith or devotion to duty;***
>
> *(ii)* ***if there is prima facie material to show recklessness or misconduct in the discharge of his duty;***
>
> *(iii) if he has acted in a manner which is unbecoming of a Government servant;*
>
> *(iv)* ***if he had acted negligently or that he omitted the prescribed conditions which are essential for the exercise of the statutory powers;***
>
> *(v) if he had acted in order to unduly favour a party;*
>
> *(vi) if he had been actuated by corrupt motive, however small the bribe may be because Lord Coke said long ago "though the bribe may be small, yet the fault is great".*
>
> *29. The instances above catalogued are not exhaustive. However, we may add that for a mere technical violation or merely because the order is wrong and the action not falling under the above enumerated instances, disciplinary action is not warranted. Here, we may utter a word of caution.* ***Each case will depend upon the facts and no absolute rule can be postulated.***
>
> (Emphasis added)

20. The decision in **K. K. Dhawan** (Supra) was followed in **Government of Tamil Nadu v. K.N. Ramamurty**: (1997) 7 SCC 101.

21. In **Duli Chand** (Supra), the Hon'ble Supreme Court held that these earlier decisions were considered by the two Judge Bench in **Zunjarrao Bhikaji**

**Nagarkar** (Supra) but the Court appears to have reverted back to the earlier view of the matter where disciplinary action could be taken against an Officer discharging judicial functions only when there was an element of culpability involved. The three Judge Bench held that **Nagarkar** case (Supra) was contrary to the view expressed in K. K. Dhawan case (Supra). The decision in **K. K. Dhawan** (Supra) being that of a Larger Bench would prevail. The decision in Nagarkar (Supra) case therefore does not correctly represent the law.

22. Therefore, the law laid down by the three Judge Bench in **Union of India v. K. K. Dhawan** (Supra), as affirmed in **Union of India v. Duli Chand (Supra)**, would govern the field.

23. Learned counsel for the respondent has relied upon a subsequent decision of a three Judge Bench of the Hon'ble Supreme Court in the case of **Ramesh Chander Singh v. High Court of Allahabad and Anr.**: (2007) 4 SCC 247, wherein the Supreme Court was considering an Appeal filed by a Judicial Officer against a major punishment order of withholding of two annual increments with cumulative effect, which, after dismissal of a writ petition filed by the Officer, was enhanced to reduction in rank. The only charge against the Officer was that he had granted a bail on insufficient grounds. The Hon'ble Supreme Court held that granting bail to accused pending trial is one of the significant functions to be performed by a Judicial Officer. The bail order passed by the Officer had not been challenged. The reasons assigned in the bail order could not be said to be totally unwarranted or superfluous. In the aforesaid factual background, the Hon'ble supreme Court held that: -

> ***"We fail to understand as to how the High Court arrived at a decision to initiate disciplinary proceedings solely based on the complaint, the contents of which were not believed to be true by the High Court.*** *If the High Court were to initiate disciplinary proceedings based on a judicial order, there should have been strong grounds to suspect officer's bona fides and the order itself should have been actuated by malice, bias or illegality..."*
>
> (Emphasis added)

24. Even in **Ramesh Chander Singh** (Supra), the Hon'ble Supreme Court followed and affirmed the law laid down in **Zunjarrao Bhikaji Nagarkar** (Supra) by stating that: -

> *"17. In Zunjarrao Bhikaji Nagarkar v. Union of India his Court held that wrong exercise of jurisdiction by a quasi-judicial authority or mistake of law or wrong interpretation of law cannot be the basis for initiating disciplinary proceeding. Of course, if the judicial officer conducted in a manner as would reflect on his reputation or integrity or good faith or there is a prima facie material to show recklessness or misconduct in discharge of his duties or he had acted in a manner to unduly favour a party or had passed an order actuated by corrupt motive, the High Court by virtue of its power under Article 235 of the Constitution may exercise its supervisory jurisdiction. Nevertheless, under such circumstances it should be kept in*

*mind that the Judges at all levels have to administer justice without fear or favour. Fearlessness and maintenance of judicial independence are very essential for an efficacious judicial system. Making adverse comments against subordinate judicial officers and subjecting them to severe disciplinary proceedings would ultimately harm the judicial system at the grassroot level."*

25. The Hon'ble Supreme Court also took into consideration the following peculiar facts of the case in **Ramesh Chander Singh** (Supra): -

*"18. Apart from the merits of the case before us, we have also gone into the confidential reports of the appellant officer. His integrity and honesty had never been doubted at any point of time. In some of the confidential reports except stating that the appellant officer was not having smooth relationship with the advocates, no other adverse remarks had been entered. Two senior Judges of the High Court have entered in his confidential register that the appellant is an officer of honesty and integrity.* ***The fact that it was a case of daylight murder wherein two persons died, is not adequate to hold that the accused were not entitled to bail at all. Passing order on a bail application is a matter of discretion which is exercised by a judicial officer with utmost responsibility. When a co-accused had been granted bail by the High Court, the appellant cannot be said to have passed an unjustified order granting bail, that too, to an accused who was a student and had been in jail for more than one year****. If at all, the inspecting Judge had found anything wrong with the order, he should have sent for the officer and advised him to be careful in future. The punishment of reverting the appellant to the post of Civil Judge (Senior Division), in the facts and circumstances of this case could only be termed as draconian and unjust. The appellant had been in the cadre of District Judge for eight years at the time this grave punishment of reversion to a lower rank was imposed on him. In our opinion, the punishment was clearly disproportionate to the lapse alleged to have been committed by him. The imposition of the punishment of withholding two increments with cumulative effect also appears to be disproportionate to the alleged lapse."*

(Emphasis added)

26. The observations made in an order passed while scrutinizing the merits of the punishment order after completion of a full-fledged disciplinary enquiry cannot form the basis of quashing a charge sheet without a challenge having been made to the final outcome of the disciplinary proceedings.

27. The learned Counsel for the respondent has also placed reliance on a judgment in the case of **Anjali Chaurasiya v. State of U.P**.: 2023 SCC OnLine All 3185, wherein a disciplinary proceeding under U.P. Government Servant (Discipline and Appeal) Rules, 1999 was initiated

against an Assistant Commissioner, Commercial Tax on the ground that she had violated provisions of the Goods and Service Tax Act as she, by arranging wrong facts, evidences and fabricated documents at her own convenience as well as with the collusion of traders, declared less valuable and less taxable plastic scraps in place of more valuable and more taxable metal/non-metal items and deposited very less amount in the State treasury instead of required tax/penalty, which caused revenue loss to the Government. The appellant was placed under suspension. The suspension order was stayed by the Writ Court but the authorities were granted liberty to proceed with the disciplinary proceedings. In appeal against the order passed by the Writ Court, a coordinate Bench of this Court noted that the order passed by the appellant, which formed the basis for her suspension and initiation of disciplinary proceedings against her, had not been revised or cancelled by the respondents. Rather, a conscious decision was taken not to take any action against the order passed by the appellant. The Division Bench held that when the respondents themselves had allowed the order passed by the appellant to attain finality and they had taken a conscious decision not to challenge the order, the disciplinary proceedings initiated on the basis of a mere suspicion raised on the basis that the assessee has deposited the penalty within a very short span of time after passing of the order, appears to be no good ground for initiation of disciplinary proceedings against the appellant. The Bench held that: -

> *"The disciplinary proceedings against the appellant have been initiated merely because the assessee has deposited the penalty within a very short span of time which raised a suspicion with regard to the penalty order passed by the appellant. In* ***Zunjarrao Bhikaji Nagarkar*** *(Supra), the Hon'ble Supreme Court has categorically held that* ***the disciplinary proceedings against an officer cannot take place on information, which is vague and indefinite and suspicion has no role to play in such matters when the department has taken a conscious decision not to challenge the order passed by the appellant and has allowed the same to attain finality****. Prima facie, it appears at this stage that the disciplinary proceedings cannot be drawn against the appellant to punish her for having passed the aforesaid order."*
>
> (Emphasis added)

28. In **Anjali Chaurasiya** (Supra), the interim order passed by the Writ Court whereby the authorities were granted liberty to proceed with the disciplinary proceedings, was stayed and the Writ Petition was left open to be decided on its merits. In **Anjali Chaurasiya** (Supra), the solitary order passed by the appellant, which formed the basis for her suspension and initiation of disciplinary proceedings against her, had not been revised or cancelled by the respondents. Rather, a conscious decision was taken not to take any action against the order passed by the appellant. In the present case, numerous orders passed by the respondent were challenged and all of those have been set aside. The facts of the present case are in no manner similar to the core fact which had formed the basis of the order passed in **Anjali Chaurasiya** (Supra) and, therefore,

the aforesaid judgment would be of no avail to the respondent in view of the law laid down in **K. K. Dhawan** (Supra) that *"Each case will depend upon the facts and no absolute rule can be postulated".*

29. The learned Counsel for the respondent has lastly relied upon a judgment of a coordinate Bench in **Hari Om Rastogi v. State of U.P.:** 2022 SCC OnLine All 2305. The appellant in that case was a Consolidation Officer, who was issued a charge sheet containing two charges stating that in two cases, he had passed mutation orders in respect of land recorded in the name of Gram Sabha, in favour of certain private individuals, causing loss to Gram Sabha. The appellant claimed he was not provided any documents and no oral evidence was recorded on behalf of the establishment. The appellant too was not examined and an ex parte inquiry report was submitted by the Inquiry Officer. The disciplinary authority issued a show cause notice to the appellant against the proposed major punishment, to which he submitted a detailed reply asserting that both the charges were not proved. Meanwhile, the appellant retired from service on 30.04.2008. On 09.07.2008, he was served with another show cause notice based on the existing inquiry report, requiring him to answer why the penalty of 50% reduction of pension and 50% deduction of gratuity be not awarded. The appellant submitted a reply disputing the truth of the charges as well as the fact that these were proved. The respondents passed a punishment order dated 03.08.2012, imposing 10% of permanent reduction in pension payable and 50% deduction, each from the pension and the gratuity. The Writ Court held that *"The inquiry officer has dealt in the inquiry as to how due procedure was not followed by the petitioner and that required precautions were not adhered to. I found merit in the argument of learned counsel for petitioner that Inquiry Officer has scrutinized the orders like an Appellate Authority and not like an Inquiry Officer. The finding of loss are not supported by any evidence or valuation of land. No witness was examined from Gram Sabha. It was also not noticed by Inquiry Officer that one order was passed only in compliance of an earlier order. The record was not verified in absence of original record which remained untraceable. The Inquiry Officer has proceeded with inquiry like an Appellate Authority and failed to decide whether any grave misconduct was committed or any pecuniary loss was caused to Gaon Sabha."* However, the Writ Court merely held that the punishment was very harsh and shockingly disproportionate and it was set aside and the matter was remanded. In Appeal, the coordinate Bench held that: -

> *"17…Once the learned Single Judge has held, and in our opinion rightly so, that it was not the business of the Inquiry Officer or the Disciplinary Authority to scrutinize the appellant's order passed in a judicial capacity, like an Appellate Authority, the findings on the charges by the Inquiry Officer and its acceptance by the Disciplinary Authority, are bad in law.*
>
> * * *
>
> *21. There is no cavil here that the respondents did not examine witnesses or led oral evidence to prove the charges against the appellant. The charges were held proved, on the basis of the Inquiry Officer going through*

*the records, that may constitute material, but not evidence in the absence of proof by oral evidence. The learned Single Judge has also held that no witness was examined from the Gaon Sabha. Thus, the inquiry that has led to the impugned order of punishment is beset by a fundamental procedural flaw, that goes to the root of the matter, on account of non-production of evidence, particularly oral evidence before the Inquiry Officer by the establishment.*

* * *

*24. In the present case, the charge against the appellant is about passing orders directing mutation on the basis of earlier orders, where original record had remained untraceable. He has passed an order of mutation i.e. subject of the first charge, acting on a copy of the order passed 10-12 years ago, where the records are said to have been destroyed by fire. The order, subject matter of the other charge, was also passed in haste, without taking precautions. But, none of the orders, as the learned Single Judge has held on perusal of records, were evidently passed to extend any undue benefit to anyone nor the appellant's integrity was proved doubtful.*

*25. In our opinion, the learned Single Judge has fallen into an error in upholding the charges in the first limb of the order and then recording findings in reference to the quantum of punishment, that go to vitiate the findings of the Inquiry Officer and the impugned order made by the Disciplinary Authority. The kind of flaws that the learned Single Judge has discerned in the process of the inquiry and the approach of the Inquiry Officer, including the orders of the Disciplinary Authority, the findings of the Inquiry Officer and the impugned order adjudging the appellant guilty, had to be quashed."*

The aforesaid order was passed in view of the peculiar facts and circumstances of the case where there was no allegation of violation of any statutory provision and not even of negligence in performance of duty and these observations were made while examining the validity of the final order of punishment. It will not apply to the present case where the charge-sheets have been challenged without conclusion of the disciplinary proceedings and the respondent has been found to be guilty of violation of settled principles of law and also of negligence and lack of good faith.

30. The law regarding scope of interference with a charge-sheet issued during departmental disciplinary proceedings was explained by the Hon'ble Supreme Court in **Ministry of Defence v. Prabhash Chandra Mirdha**: (2012) 11 SCC 565 in the following words: -

*"12. Thus, the law on the issue can be summarised to the effect that the charge-sheet cannot generally be a subject-matter of challenge as it does not adversely affect the rights of the delinquent unless it is established that the same has been issued by an authority not competent to initiate the disciplinary proceedings.*

*Neither the disciplinary proceedings nor the charge-sheet be quashed at an initial stage as it would be a premature stage to deal with the issues. Proceedings are not liable to be quashed on the grounds that proceedings had been initiated at a belated stage or could not be concluded in a reasonable period unless the delay creates prejudice to the delinquent employee. Gravity of alleged misconduct is a relevant factor to be taken into consideration while quashing the proceedings."*

31. When we examine the facts of the present case in light of the law laid down in the above referred cases, it appears that the respondent was charged and has been found guilty of deciding not one or two, but numerous cases in violation of the provisions of procedural as well as substantive law. All those orders have been recalled by the subsequent Presiding Officer of the Court concerned. The respondent has been found guilty of acting in a manner which establishes lack of good faith or devotion to duty. He has been found to have acted negligently and he has violated the prescribed conditions which are essential for the exercise of the statutory powers.

32. Although it is recorded in the order dated 01.08.2024 passed by the Writ Court that *"on being confronted on the point that if any charge-sheet has been issued without jurisdiction and the charges are non est in the eyes of law as to how such charge-sheet may be issued against the petitioner, the learned Counsel had sought time to seek specific instructions on that point",* in the impugned judgment dated 08.08.2024 no finding has been recorded that the charge-sheet has been issued by an authority not competent to initiate the disciplinary proceedings and no such contention has been raised by the learned Counsel for the respondent even during submissions advanced in opposition of the Appeal.

33. There is no allegation of delay in initiation of the disciplinary proceedings, rather the Writ Petition challenging the charge sheets was filed with a delay of two years.

34. In these circumstances, the disciplinary proceedings against the respondent cannot be quashed as per the law laid down by the Hon'ble Supreme Court in the above mentioned cases.

35. In view of the foregoing discussion, we find ourselves unable to concur with the view taken by the Writ Court. Accordingly, the Special Appeal is **allowed**. The judgment and order dated 08.08.2024 passed in Writ A No.6001 of 2024 is set aside and the Writ Petition is **dismissed**.

36. The appellants are directed to conclude the disciplinary proceedings against the respondent in furtherance of the charge-sheet dated 08.09.2022 and the supplementary charge-sheet dated 29.11.2022 issued against the respondent and the enquiry report dated 03.08.2024 expeditiously, in accordance with the law. The parties shall bear their own costs of litigation.

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**(2024) 11 ILRA 295**
**ORIGINAL JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 11.11.2024**

**BEFORE**

**THE HON'BLE MANISH MATHUR, J.**

Application U/S 482 No. 34275 of 2024

**Manoj Kumar Yadav & Anr. ...Applicants**
**Versus**
**State of U.P. & Anr. ...Respondents**

**Counsel for the Applicants:**
Ekansh Varma, Vishnu Kumar Srivastava

**Counsel for the Respondents:**
G.A.

**Criminal Law - Indian Penal Code, 1860 - Sections 420, 452, 504 & 506 - Against summoning order - Maintainability - Constitution of India, 1950 - Article 227 - The Code of Criminal Procedure, 1973 - Sections 156(3), 200, 397(3) - St. raised objection regarding maintainability of instant application, and submitted that in view of fact summoning order and revisional order was under challenge, application was not maintainable since applicants have alternative remedy of filing petition u/a 227 - Further taken recourse to Section 397(3) and bar contained therein to submit that in cases where second revision was not maintainable, applicants cannot take recourse proceeding u/s 482 to bye pass the bar. (Para 5)**

**Held, neither Article 227 nor Section 482 indicate any aspect ousting jurisdiction of other - In such circumstances, provisions of Article 227 and Section 482 operate on concurrent basis providing option to applicant to approach Court under either provision. (Para 11)**

**Regarding complaint, complainant admitted he had taken loan pertaining to moveable property from Bank, did not repay - Applicants, official of Finance Company, initiated proceedings for recovery of loan amount by arbitration proceedings, award passed and due to this, complaint lodged against applicants not to recover loan. (Para 14)**

**Serious contradiction in averments made in complaint regarding injury upon complainant and his family members by applicants - Till next date of listing, proceedings shall remain stayed. (Para 15)**

**Application pending.** (E-13)

**List of Cases cited:**

1. Madhu Limaye Vs The St. of Mah.; (1977)4 SCC 551, (Para 10)

2. Krishnan & anr. Vs Krishnaveni & anr.; AIR 1997 SC 987, (Para 14)

3. Prabhu Chawla Vs St. of Raj. & anr.; AIR 2016 SC 4245, (Para 6)

4. G. Sagar Suri & anr. Vs St. of U.P. & ors. reported in (2000)2 SCC 636, (Para 7)

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

1. Heard learned counsel for applicants and learned Additional Government Advocate appearing for opposite party no.1 State.

2. Issue notice to opposite party no.2, returnable at an early date.

3. Application under Section 482 Cr.P.C. has been filed challenging summoning order dated 16.11.2023 as well as proceedings of Complaint Case No.326 of 2019; Amjad Khan versus Manoj Yadav & Ors., under Sections 420, 452, 504 & 506 I.P.C., Police Station Babina, District Jhansi as well as order dated 29.08.2024 passed in Criminal Revision Case No.42 of

2024; Manoj Yadav & Ors. versus State of U.P. & Ors.

4. Also under challenge is the revisional order dated 29.08.2024 whereby Criminal Revision preferred by the applicants has been rejected.

5. At the very outset, learned Additional Government Advocate has raised a preliminary objection regarding maintainability of this application under Section 482 Cr.P.C. with the submission that in view of the fact that summoning order as well as revisional order is under challenge, the application under Section 482 Cr.P.C. is not maintainable since applicants have an alternative and equally efficacious remedy of filing of petition under Article 227 of the constitution of India. Learned Additional Government Advocate has taken recourse to Section 397(3) Cr.P.C. and the Bar contained therein to submit that in cases where a second revision is not maintainable, the applicants cannot take recourse a proceeding under Section 482 Cr.P.C. to bye pass the Bar created in the aforesaid provision.

6. Learned counsel for applicants has refuted submissions advanced by learned Additional Government Advocate with the submission that proceedings under Article 227 of the Constitution of India and Section 482 Cr.P.C. are concurrent in nature for the purposes of exercising supervisory control over the trial courts and therefore one provision will not oust the other. It is further submitted that since Section 482 Cr.P.C. commences with a non obstante clause, it would prevail over other provisions of Cr.P.C. including the bar of Section 397(3) Cr.P.C. Learned counsel has adverted to the following judgements:-

"(i.) ***Madhu Limaye versus The State of Maharashtra; (1977)4 SCC 551,***

(ii) ***Krishnan & Anr. v. Krishnaveni & Anr.; AIR 1997 SC 987, and***

(iii) ***Prabhu Chawla versus State of Rajasthan & Anr.; AIR 2016 SC 4245"***

7. With regard to submissions of learned Additional Government Advocate, Hon'ble the Supreme Court in the cases of ***Madhu Limaye versus The State of Maharashtra; (1977)4 SCC 551, Krishnan & Anr. v. Krishnaveni & Anr.; AIR 1997 SC 987, and Prabhu Chawla versus State of Rajasthan & Anr.; AIR 2016 SC 4245*** has already held that since provisions of Section 482 Cr.P.C. commence with a non obstante clause, it would have primacy over all the other provisions of the aforesaid Court including the bar of Section 397(3) Cr.P.C. Law enunciated in the case of Madhu Limaye (supra) is as follows:

*"10. As pointed out in Amar Nath's case (supra) the purpose of putting a bar on the power of revision in relation to any interlocutory order passed in an appeal, inquiry, trial or other proceeding, is to bring about expeditious disposal of the cases finally. More often than not, the revisional power of the High Court was resorted to in relation to interlocutory orders delaying the final disposal of the proceedings. The Legislature in its wisdom decided to check this delay by introducing sub-section (2) in Section 397. On the one hand, a bar has been put in the way of the High Court (as also of the Sessions*

*Judge) for exercise of the revisional power in relation to any interlocutory order, on the other, the power has been conferred in almost the same terms as it was in the 1898 Code. On a plain reading of Section 482, however, it would follow that nothing in the Code, which would include sub-section (2) of Section 397 also, "shall be deemed to limit or affect the inherent powers of the High Court", But, if we were to say that the said bar is not to operate in the exercise of the inherent power at all, it will be setting at naught one of the limitations imposed upon the exercise of the revisional powers. In such a situation, what is the harmonious way out? In our opinion, a happy solution of this problem would be to say that the bar provided in sub-section (2) of Section 397 operates only in exercise of the revisional power of the High Court, meaning thereby that the High Court will have no power of revision in relation to any interlocutory order. Then in accordance with one of the other principles enunciated above, the inherent power will come into play, there being no other provision in the Code for the redress of the grievance of the aggrieved party. But then, if the order assailed is purely of an interlocutory character which could be corrected in exercise of the revisional power of the High Court under the 1898 Code, the High Court will refuse to exercise its inherent power. But in case the impugned order clearly brings about a situation which is an abuse of the process of the Court or for the purpose of securing the ends of justice interference by the High Court is absolutely necessary, then nothing contained in Section 397(2) can limit or affect the exercise of the inherent power by the High Court. But such cases would be few and far between. The High Court must exercise the inherent power very sparingly. One such case would be the desirability of the quashing of a criminal proceeding initiated illegally, vexatiously or as being without jurisdiction. Take for example a case where a prosecution is launched under the Prevention of Corruption Act without a sanction, then the trial of the accused will be without jurisdiction and even after his acquittal a second trial, after proper sanction will not be barred on the doctrine of autrefois acquit. Even assuming, although we shall presently show that it is not so, that in such a case an order of the Court taking cognizance or issuing processes is an interlocutory order, does it stand to reason to say that inherent power of the High Court cannot be exercised for stopping the criminal proceeding as early as possible, instead of harassing the accused up to the end? The answer is obvious that the bar will not operate to prevent the abuse of the process of the Court and/or to secure the ends of justice. The label of the petition filed by an aggrieved party is immaterial. The High Court can examine the matter in an appropriate case under its inherent powers. The present case undoubtedly falls for exercise of the power of the High Court in*

*accordance with Section 482 of the 1973 Code, even assuming, although not accepting, that invoking the revisional power of the High Court is impermissible."*

8. Similarly relevant paragraph in the case of ***Krishnan*** (supra) is as follows:

*"14. .....under sub-section (1) of Section 397 is prohibited by sub-section (3) thereof, inherent power of the High Court is still available under Section 482 of the Code and as it is paramount power of continuous superintendence of the High Court under Section 483, the High Court is justified in interfering with the order leading to miscarriage of justice and in setting aside the order of the courts below. .....".*

9. Similarly, in the case of ***Prabhu Chawla*** (supra) it has already been held that since provisions of Section 482 Cr.P.C. commence with a non obstante clause, it would have primacy over all the other provisions of the aforesaid Court including the bar of Section 397(3) Cr.P.C. law enunciated are as follows:

*"6. In our considered view any attempt to explain the law further as regards the issue relating to inherent power of the High Court under Section 482 CrPC is unwarranted. We would simply reiterate that Section 482 begins with a non obstante clause to state:*

*"482.Saving of inherent powers of High Court.?Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any court or otherwise to secure the ends of justice."*

*A fortiori, there can be no total ban on the exercise of such wholesome jurisdiction where, in the words of Krishna Iyer, J.*

*"abuse of the process of the court or other extraordinary situation excites the Court's jurisdiction. The limitation is self-restraint, nothing more". (Raj Kapoor case [Raj Kapoor v. State, (1980) 1 SCC 43 : 1980 SCC (Cri) 72] , SCC p. 48, para 10)*

*We venture to add a further reason in support. Since Section 397 CrPC is attracted against all orders other than interlocutory, a contrary view would limit the availability of inherent powers under Section 482 CrPC only to petty interlocutory orders! A situation wholly unwarranted and undesirable."*

10. Upon consideration of submissions advanced by learned counsel for parties and perusal of material on record, it appears that against the summoning order, applicants have preferred the revision under Section 397(3) Cr.P.C. and upon its rejection, the present application under Section 482 Cr.P.C. has been filed.

11. So far as availability of filing a petition under Article 227 of the Constitution of India is concerned, the wordings of the aforesaid Article juxtaposed with the wordings of Section 482 Cr.P.C. clearly indicate that such

jurisdiction is to be exercised by this Court as a supervisory jurisdiction in order to prevent abuse of process of law. Neither Article 227 of the Constitution of India nor Section 482 Cr.P.C. indicate any aspect ousting jurisdiction of the other. In such circumstances, it can only be held that provisions of Article 227 of the Constitution of India as well as Section 482 Cr.P.C. operate on a concurrent basis providing an option to an applicant to approach this Court under either provision.

12. The said aspect has also been considered by Hon'ble the Supreme Court in the ***G. Sagar Suri & Anr. versus State of U.P. & Ors. reported in (2000)2 SCC 636*** in the following manner:

> *"7. It was submitted by Mr Lalit, learned counsel for the second respondent that the appellants have already filed an application in the Court of Additional Judicial Magistrate for their discharge and that this Court should not interfere in the criminal proceedings which are at the threshold. We do not think that on filing of any application for discharge, the High Court cannot exercise its jurisdiction under Section 482 of the Code. In this connection, reference may be made to two decisions of this Court in Pepsi Foods Ltd. v. Special Judicial Magistrate [(1998) 5 SCC 749 : 1998 SCC (Cri) 1400] and Ashok Chaturvedi v. Shitul H. Chanchani [(1998) 7 SCC 698 : 1998 SCC (Cri) 1704] wherein it has been specifically held that though the Magistrate trying a case has jurisdiction to discharge the accused at any stage of the trial if he considers the charge to be groundless but that does not mean that the accused cannot approach the High Court under Section 482 of the Code or Article 227 of the Constitution to have the proceeding quashed against them when no offence has been made out against them and still why must they undergo the agony of a criminal trial."*

13. In view of aforesaid discussion and settled law with regard to this proposition, preliminary objection raised by learned Additional Government Advocate is hereby rejected.

14. So far as merits of case are concerned, leaned counsel for applicants has adverted to the complaint made under Section 156(3) Cr.P.C. to submit that the complainant himself has admitted the fact that he has availed himself of loan pertaining to moveable property from the Bank which he did not repay. It is submitted that the applicants are official of the Finance Company who had initiated proceedings for recovery of the loan amount by means of arbitration proceedings in which an award has also been passed and it is owing to this fact that the complaint has been lodged against them to compel the Finance Company not to recover the loan. It is submitted that ex facie contents of the complaint itself indicate that a criminal colour is being sought to be given to a purely civil dispute.

15. Learned counsel has also adverted to statement recorded under Section 200 Cr.P.C. to submit that there is serious contradiction in the averments made in the complaint and the said statement particularly with regard to

applicants having inflicted injury upon complainant and his family members.

16. It is submitted that from a bare perusal of the complaint and statement of the complainant, provisions of Sections 420 504, 506 IPC are not made out and is a factor which was not considered by the trial court.

17. Learned Additional Government Advocate has opposed the application with the submission that at the stage of taking cognizance of a complaint, the aspects required to be considered by the trial court have been adverted to.

18. Prima facie submissions advanced by learned counsel for applicants have force and require consideration for which opposite parties are granted time to file counter affidavit.

19. List this case on 18.12.2024, before appropriate Court along with service report.

20. Till next date of listing, the proceedings in Complaint Case No.326 of 2019; Amjad Khan versus Manoj Yadav & Ors., under Sections 420, 452, 504 & 506 I.P.C., Police Station Babina, District Jhansi as well as order dated 29.08.2024 passed in Criminal Revision Case No.42 of 2024; Manoj Yadav & Ors. versus State of U.P. & Ors shall remain stayed.

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**(2024) 11 ILRA 300**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 05.11.2024**

**BEFORE**

**THE HON'BLE SALIL KUMAR RAI, J.**

Writ -A No. 817 of 2024

**Dinesh Kumar ...Petitioner**
**Versus**
**State of U.P. & Anr. ...Respondents**

**Counsel for the Petitioner:**
Sri Siddharth Khare

**Counsel for the Respondents:**
C.S.C.

**A. Civil Law - Constitution of India,1950-Article 226-whether the omission to disclose pending criminal cases by a selected candidate in a declaration form disqualified him from govt. employment, despite subsequent acquittal and non-involvement in one of the cases-Non-disclosure of pending or past criminal cases must be evaluated contextually, taking into account the nature of offenses, the outcome of the cases and the intent behind the omission-The Apex Court laid down principles in Avtar Singh cases and subsequent cases, held that suppression of trivial matters or unintentional omissions cannot automatically disqualify a candidate-Employers must exercise discretion reasonably and fairly, avoiding arbitrary decisions in assessing character verification and suitability for appointment-Hence, the court quashed the rejection order issued by the State and directed the issuance of the appointment letter to the petitioner within one month-the court held that the petitioner's omission was neither deliberate nor material to his suitability for the post, given his acquittal and the District Magistrate's favorable report.**

**The writ petition is allowed.** (E-6)

**List of Cases cited:**

1. St. of W.B. & ors. Vs Mitul Kr. Jana Civil Appeal No. 8510 of 2011

2. Commr. Of Police, Delhi & anr. Vs Dhavat Singh (1999) 1 SCC 246

3. Joginder Singh Vs U.T. of Chandigarh & ors. (2015) 2 SCC 377

4. Avtar Singh Vs U.O.I. & ors. (2016) 8 SCC 471

5. Pawan Kr. Vs U.O.I. & anr. (2022) SCC OnLine SC 532

6. Ravindra Kr. Vs St. of U.P. & ors. (2024) SCC OnLine SC 180

7. Vishal Kr. Vs St. of U.P. & 4 Ors, SPLA No. 532 of 2023

8. Satyendra Singh Vs St. of U.P.& ors., Writ-A No. 16791 of 2023

9. Chandrajeet Kr. Gond Vs HC at Alld (2024) SCC OnLine Alld. 251

10. The St. of M.P. & ors. Vs Bhupendra Yadav (2023) LiveLaw SC 810

11. Satish Chandra Yadav Vs U.O.I. & ors. (2022) LiveLaw SC 798

12. Ram Kumar Vs St. of U.P. & ors. (2011) 14 SCC 709

(Delivered by Hon'ble Salil Kumar Rai, J.)

1. The issue in the present petition is as to whether the appointing authority can deny appointment to a selected candidate on the ground of non-disclosure of criminal cases registered against him even though the candidate was not named in the charge sheet filed in one case and was acquitted in the other case.

2. No counter affidavit is required in the case as copies of instructions to the Standing Counsel and necessary documents have been handed over to the Court by the Standing Counsel.

3. The petitioner applied for appointment to the post of Samiksha Adhikari / Sahayak Samiksha Adhikari in Civil Secretariat of Public Service Commission, Board of Revenue and the office of the Chief Election Officer in pursuance to the advertisement dated 05.03.2021 issued by the Uttar Pradesh Public Service Commission notifying the Samiksha Adhikari / Sahayak Samiksha Adhikari (General / Special Recruitment) Examination - 2021. The petitioner was selected for appointment and was asked to fill up a verification form / declaration which required the petitioner to disclose the details of the criminal case, if any, pending or registered against him. The petitioner submitted his declaration form indicating that no criminal case was either pending or registered against him. However, subsequently, the petitioner filed an affidavit stating that Case Crime No. 198 of 2019 under Sections 147/ 323/ 504/ 506/ 325 IPC and Case Crime No. 215 of 2018 under Section 354(D) IPC and Section 12 of the Protection of Children From Sexual Offences Act, 2012 had been registered against him. It has been stated in the writ petition that a charge-sheet had been filed in Case Crime No. 198 of 2019 registering Case No. 271 of 2020 in the court of Additional Chief Judicial Magistrate, Bhadohi. In the supplementary affidavit filed by the petitioner, it has been stated that the petitioner has been acquitted in Case No. 271 of 2020 by order dated 27.03.2024 passed by the Additional Chief Judicial Magistrate, District Bhadohi. It has been further brought on record that the petitioner was not named in the charge sheet submitted in Case Crime No. 215 of 2018

4. In his report dated 04.07.2023, the District Magistrate, Bhadohi recommended that there was no legal impediment in appointing the petitioner as

Assistant Review Officer subject to the final decision of the trial court in Case Crime No. 198 of 2019. In his report, the District Magistrate noted that the petitioner was wrongly named in the First Information Report registering Case Crime No. 215 of 2018 and was not named in the charge sheet and that the petitioner was not involved in any organized crime or mafia activities and no case involving moral turpitude was pending against him. However, by order dated 11.12.2023 passed by the Joint Secretary, Secretariat Administration Section - 5 (Establishment), Government of Uttar Pradesh, Lucknow, the claim of the petitioner for appointment as Assistant Review Officer has been rejected on the ground that the petitioner had suppressed material information regarding pendency of criminal cases against him. The order dated 11.12.2023 has been challenged in the present petition.

5. It has been argued by the counsel for the petitioner that the failure of the petitioner to disclose the pendency of criminal cases against him was not deliberate but was due to oversight and that the petitioner had subsequently filed his affidavit disclosing the two criminal cases registered against him. It was argued by the counsel for the petitioner that in light of Office Memorandum dated 28.04.1958, the recommendations of the District Magistrate were relevant materials which had to be considered by the appointing authority but in his order dated 11.12.2023, the Joint Secretary has not considered the recommendations of the District Magistrate made vide his report dated 04.07.2023. It was argued that in his order dated 11.12.2023, the Joint Secretary has also not considered that the incident giving rise to Case Crime No. 198 of 2019 was trivial in nature and could not have been a reason to disqualify the petitioner. It was further argued that the order dated 11.12.2023 has been passed by the Joint Secretary arbitrarily and mechanically and reveals a total non-application of mind, therefore, the order dated 11.12.2023 is contrary to law and is liable to be quashed. In support of his contention, the counsel for the petitioner has relied on the judgment and order dated 22.08.2023 passed by the Supreme Court in ***Civil Appeal No. 8510 of 2011 (State of West Bengal and Ors. vs. Mitul Kumar Jana*** and the judgments reported in ***Commissioner of Police, Delhi & Anr. vs. Dhaval Singh 1999 (1) SCC 246; Joginder Singh vs. Union Territory of Chandigarh & Ors. 2015 (2) SCC 377; Avtar Singh vs. Union of India & Ors. 2016 (8) SCC 471; Pawan Kumar vs. Union of India & Anr. (2022) SCC OnLine SC 532; Ravindra Kumar vs. State of U.P. & Ors. (2024) SCC OnLine SC 180 and Vishal Kumar vs. State of U.P. & 4 Ors. (Special Appeal No. 532 of 2023).***

6. Rebutting the contention of the counsel for the petitioner, the Standing Counsel has argued that the declaration/ verification form included a warning that in case, any information given in the declaration form was found to be false or any material information was concealed, the candidate would stand disqualified for appointment and his services would also be liable to be terminated. It was argued by the Standing Counsel that admittedly, the petitioner had knowledge of the criminal cases pending against him and had made a false representation stating that no criminal case was pending against him, therefore, the petitioner stood disqualified to be appointed as Assistant Review Officer and there is no illegality in the order passed by the Joint Secretary rejecting the claim of the petitioner for appointment. It was

argued that for the aforesaid reasons, the writ petition is liable to be dismissed. In support of his contention, the counsel for the respondent has relied on the judgments of this Court reported in ***Satyendra Singh vs. State of U.P. & Ors. (Writ – A No. 16791 of 2023)*** as well as ***Chandrajeet Kumar Gond vs. High Court of Judicature at Allahabad 2024 SCC Online Allahabad 251*** and of the Supreme Court reported in ***The State of Madhya Pradesh & Ors. vs. Bhupendra Yadav (2023) LiveLaw (SC) 810 and Satish Chandra Yadav vs. Union of India & Ors. 2022 LiveLaw (SC) 798***.

7. I have considered the submissions of the counsel for the parties.

8. In **Avtar Singh (supra)**, the Supreme Court, after considering its previous judgements, observed that the 'whole idea of verification of character and antecedents is that the person suitable for the post in question is appointed' and that 'an incumbent should not have antecedents of such a nature which may adjudge him unsuitable for the post.' It was observed that mere involvement in some petty kind of case would not render a person unsuitable for the job. The Supreme Court further held that suppression of material information presupposes that suppression is of facts which matter and failure to disclose a trivial matter would not be relevant to refuse appointment or to cancel the selection. The Supreme Court observed that a person who had suppressed material information may not claim unfettered right of appointment or continuity in service but he had a right not to be dealt with arbitrarily and exercise of power had to be in a reasonable manner having due regard to the facts. The yardstick to be applied while taking a decision depended on the nature of the post, the nature of the suppression as well as the nature of the case and chance of reformation had to be afforded to young offenders in suitable cases. It was also held by the Court that the employer had to act on due consideration of rules / instructions. The Supreme Court summarized the law regarding appointment, offer of appointment, cancellation of offer or termination of appointment in cases where the applicant had either suppressed the facts regarding criminal cases registered against him or was acquitted / convicted in any criminal case. Paragraph nos. 35 to 38 of the judgment of the Supreme Court expounding the law on the aspect are reproduced below:-

> ***"35. Suppression of "material" information presupposes that what is suppressed that "matters" not every technical or trivial matter. The employer has to act on due consideration of rules/instructions, if any, in exercise of powers in order to cancel candidature or for terminating the services of employee. Though a person who has suppressed the material information cannot claim unfettered right for appointment or continuity in service but he has a right not to be dealt with arbitrarily and exercise of power has to be in reasonable manner with objectivity having due regard to facts of cases.***
>
> ***36. What yardstick is to be applied has to depend upon the nature of post, higher post would involve more rigorous criteria for all services, not only to uniformed service. For lower posts which are***

***not sensitive, nature of duties, impact of suppression on suitability has to be considered by authorities concerned considering post/nature of duties/services and power has to be exercised on due consideration of various aspects.***

*37. The "McCarthyism" is antithesis to constitutional goal,* ***chance of reformation has to be afforded to young offenders in suitable cases****, interplay of reformative theory cannot be ruled out in toto nor can be generally applied but is one of the factors to be taken into consideration while exercising the power for cancelling candidature or discharging an employee from service.*

*38. We have noticed various decisions and tried to explain and reconcile them as far as possible. In view of the aforesaid discussion, we summarize our conclusion thus:*

*38.1 Information given to the employer by a candidate as to conviction, acquittal or arrest, or pendency of a criminal case, whether before or after entering into service must be true and there should be no suppression or false mention of required information.*

*38.2* ***While passing order of termination of services or cancellation of candidature for giving false information, the employer may take notice of special circumstances of the case, if any, while giving such information.***

*38.3* ***The employer shall take into consideration the Government orders/instructions/rules, applicable to the employee, at the time of taking the decision.***

*38.4* ***In case there is suppression or false information of involvement in a criminal case where conviction or acquittal had already been recorded before filling of the application/verification form and such fact later comes to knowledge of employer, any of the following recourses appropriate to the case may be adopted : -***

***38.4.1 In a case trivial in nature in which conviction had been recorded, such as shouting slogans at young age or for a petty offence which if disclosed would not have rendered an incumbent unfit for post in question, the employer may, in its discretion, ignore such suppression of fact or false information by condoning the lapse.***

*38.4.2. Where conviction has been recorded in case which is not trivial in nature, employer may cancel candidature or terminate services of the employee.*

*38.4.3* ***If acquittal had already been recorded in a case involving moral turpitude or offence of heinous/serious nature, on technical ground and it is not a case of clean acquittal, or benefit of reasonable doubt has been given, the employer may consider all relevant facts available as to antecedents, and may take appropriate decision as to the continuance of the employee.***

*38.5 In a case where the employee has made declaration truthfully of a concluded criminal case, the employer still has the*

*right to consider antecedents, and cannot be compelled to appoint the candidate.*

*38.6 In case when fact has been truthfully declared in character verification form regarding pendency of a criminal case of trivial nature, employer, in facts and circumstances of the case, in its discretion, may appoint the candidate subject to decision of such case.*

***38.7 In a case of deliberate suppression of fact with respect to multiple pending cases such false information by itself will assume significance and an employer may pass appropriate order cancelling candidature or terminating services as appointment of a person against whom multiple criminal cases were pending may not be proper.***

*38.8 If criminal case was pending but not known to the candidate at the time of filling the form, still it may have adverse impact and the appointing authority would take decision after considering the seriousness of the crime.*

*38.9 In case the employee is confirmed in service, holding departmental enquiry would be necessary before passing order of termination/removal or dismissal on the ground of suppression or submitting false information in verification form.*

*38.10 For determining suppression or false information attestation/verification form has to be specific, not vague. Only such information which was required to be specifically mentioned has to be disclosed. If information not asked for but is relevant comes to knowledge of the employer the same can be considered in an objective manner while addressing the question of fitness. However, in such cases action cannot be taken on basis of suppression or submitting false information as to a fact which was not even asked for.*

*38.11 Before a person is held guilty of suppressioveri or suggestio falsi, knowledge of the fact must be attributable to him."*

*(emphasis supplied)*

9. Subsequently, the Supreme Court in **Ravindra Kumar (supra)** held that there was no hard-and-fast or cut-and-dried rule that, in all circumstances, non disclosure of a criminal case would be fatal for a candidate's employment even if the candidate was acquitted in the criminal case. The Court held that each case would turn on its special facts and circumstances. The court further observed that ***broad-brushing every non-disclosure as a disqualification, would be unjust and the same would tantamount to being completely oblivious to the ground realities*** obtaining in this great, vast and diverse country and the court will have to take a holistic view, based on objective criteria, with the available precedents serving as a guide and it can never be a one size fits all scenario. The Supreme Court after considering its previous judgment in ***Satish Chandra Yadav (supra)*** observed, in paragraph no. 31 of the report, that the 'nature of the office, the timing and ***nature of the criminal case; the overall consideration of the judgement of acquittal***; the nature of the query in the application/verification form; the contents of the character verification reports; ***the***

***socio economic strata of the individual applying; the other antecedents of the candidate;*** the nature of consideration and the contents of the cancellation/termination order ***were some of the crucial aspects which should enter the judicial verdict in adjudging the suitability and in determining the nature of relief to be ordered***.' It would be relevant to note that in ***Ravindra Kumar (Supra)***, the Supreme Court, while deciding in favour of the selected candidate, took note of the fact that the candidate hailed from a small village, there was no criminal case pending against him on the date of filing the application form, the criminal case was registered against the candidate when he was only 21 years of age, the verification report after noticing the criminal case and the subsequent acquittal, stated that the character of the candidate was good and that no complaints were found against him as well as the fact that the general reputation of the candidate was good, the Station House Officer in his report had certified the character of the candidate as excellent and that the candidate was eligible to do Government Service under the State Government. The court also noticed that the report of the Station House Officer was endorsed by the Superintendent of Police who reiterated that the character of the candidate was excellent.

10. At this stage, it would be relevant to consider some of the judgments referred by the Standing Counsel to support the impugned order.

11. In ***Bhupendra Yadav (supra)***, a criminal case under Sections 341/354 (D) of the Indian Penal Code read with Sections 11(D)/12 of the POCSO Act was registered against the applicant. During the trial of the case a compromise was arrived at between the applicant and the complainant. A compromise application was filed as a result of which the charge under Section 341 I.P.C. was compounded. So far as charges under Section 354(D) and Sections 11(D)/12 of the POCSO Act were concerned, the trial court acquitted the applicant because the prosecutrix and other prosecution witnesses had turned hostile and refused to support the case set up by the prosecution. Subsequently, the applicant was appointed on the post of constable after having qualified the selection test held for filling up vacancies on the post of constable. After his joining, the applicant was asked to furnish information on criminal cases pending or registered against him. The applicant disclosed the details of the aforesaid criminal case indicating that he had been acquitted in the said case by the trial court. An order was passed by the appointing authority holding the applicant to be unfit for government service on the ground that offences under Section 354-D and Sections 11(D)/12 of the POCSO Act were offences of moral turpitude. It was argued before the Supreme Court that the order of the appointing authority was bad in law because the applicant, while filling the verification form, had furnished all the requisite informations and had truthfully disclosed the facts of the criminal case and its final outcome and that the applicant had been acquitted in the case. The Supreme Court after referring to to Paragraph nos. 38.4.3 and 38.5 of the judgment in ***Avtar Singh (Supra)*** held that even in cases of truthful disclosure the employer was well within its rights to examine the fitness of a candidate and in a concluded criminal case, the employer had to keep in mind the nature of the offence and verify whether the acquittal is honourable or benefit has been extended to the accused on technical grounds. It was held by the Supreme Court

that the employer was empowered not to appoint a candidate or continue the incumbent on the post if the employer arrives at the conclusion that the candidate is a suspect character or unfit for the post. The Supreme Court noted that the charges against the applicant involved moral turpitude and that his acquittal was not a clean and honourable acquittal but the acquittal was because of the compromise between the complainant and the applicant and during trial the prosecutrix as well as other prosecution witness had refused to support the case of the prosecution.

12. In ***Satish Chandra Yadav (supra)***, a charge sheet had been filed against the employee. The Supreme Court recognized that each case had to be scrutinized thoroughly by the employer concerned and the Court is obliged to examine whether the procedure of inquiry adopted by the authority was fair and reasonable. In ***Ravindra Kumar (Supra)***, the Supreme Court considered ***Satish Chandra Yadav (supra)*** and held that mere non-disclosure of a criminal case by a candidate who had been acquitted cannot be fatal for the candidate's employment and broad brushing every non-disclosure as a disqualification would be unjust.

13. In **Chandrajeet Kumar Gond (supra*)***, the Division Bench of this Court (of which I was a member) rejected the claim of the petitioner and affirmed the order passed by the employer terminating the services of the employee as the case registered against the petitioner was under Section 307 of IPC and was, therefore, serious in nature.

14. As noted above, in **Avtar Singh (Supra)**, the Supreme Court held that while deciding the suitability for appointment of a selected candidate against whom a criminal case had been registered, the employer had to take into consideration the Government orders/instructions/rules applicable at the time of taking the decision. Hence, at this stage it would be relevant to refer to the rules and instructions of the State Government regarding the verification of the character and antecedents of applicants for government service before their first appointment. The Office Memorandum dated 28.4.1958 prescribes the manner of and factors relevant for verification of character and antecedents of applicants for government service.

15. Clause 3 (b) of the Office Memorandum dated 28.04.1958 provides that in cases of doubt regarding the conduct and character of the candidate, the appointing authority may either ask for further references or may refer the matter to the District Magistrate concerned who may then make such further inquiries as he considers necessary. A reading of Clause 3 (b) and the Note to Clause 3 shows that the report of the District Magistrate is a relevant and an important material to be taken into consideration while deciding the suitability of a candidate for appointment to any post under the State Government. The Note to Clause 3 provides that a ***mere conviction by itself would not be a cause to refuse a certificate of good character and would also not be a disqualification for appointment to government service***. It is the entire circumstances in which the conviction was recorded and the circumstances in which the candidate is presently placed which should be considered while deciding the suitability of the candidate for appointment to government service. The Note also acknowledges that while deciding the

suitability of the candidate for appointment to government service the fact that he had completely reformed himself would be relevant. Clause 3 of the Office Memorandum dated 28.04.1958 and the Note attached to the clause are reproduced below:-

*"3. a) Every direct recruit to any service under the Uttar Pradesh Government will be required to produce:*

*(i) A certificate of conduct and character from the head of the educational institution where he last studied (if he went to such an institution).*

*(ii) Certificates of character from two persons. The appointing authority will lay down requirements as to kind of persons from whom it desires these certificates.*

*(b) In cases of doubt, the appointing authority may either ask for further references, or may refer the case to the District Magistrate concerned. The District Magistrate may then make such further enquiries as he considers necessary.*

*Notes.-(a)* ***A conviction need not of itself involve the refusal of a certificate of good character. The circumstances of the conviction should be taken into account*** *and if they involve no moral turpitude or association with crimes of violence or with a movement which has as its object to overthrow by violent means of Government as by law now established in free India the* ***mere conviction need not be regarded as disqualification****. (Conviction of a person during his childhood should not necessarily operate as a bar to his entering Government service.* ***The entire circumstances in which his conviction was recorded as well as the circumstances in which he is now placed should be taken into consideration. If he has completely reformed himself on attaining the age of understanding and discretion, mere conviction in childhood should not operate as a bar to his entering Government service).***

*(b) While no person should be considered unfit for appointment solely because of his political opinions, care should be taken not to employ persons who are likely to be disloyal and to abuse the confidence placed in them by virtue of their appointment. Ordinarily, persons who are actively engaged in subversive activities including members of any organization the avowed object of which is to change the existing order of society by violent means should be considered unfit for appointment under Government. Participation in such activities at any time after attaining the age of 21 years and within three years of the date of enquiry should be considered as evidence that the person is still actively engaged in such activities unless in the interval there is positive evidence of a change of attitude,*

*(c) Persons dismissed by the Central Government or by a State Government will also be deemed to be unfit for appointment to any service under this Government.*

*In the case of direct recruits to the State Services under the Uttar Pradesh Government besides requiring the candidates to submit the certificates mentioned in paragraph 3 (a) above the appointing authority shall refer all cases simultaneously to the Deputy Inspector General of Police, Intelligence and the District Magistrate [of the home district and of the district(s) where the candidate has resided for more than a year within five years of the date of the inquiry) giving full particulars about the candidate. The District Magistrate shall get the reports in respect of the candidates from the Superintendent of Police who will consult District Police Records and records of the Local Intelligence Unit. The District Police or the District Intelligence Unit shall not make any enquiries on the spot, but shall report from their records whether there is anything against the candidate, but if in any specific case the District magistrate, at the instance of the appointing authority asks for an enquiry on the spot, the Local Police or the Local Intelligence Units will do so and report the result to him. The District Magistrate shall then report his own views to the appointing authority. Where the District Police or the Local Intelligence Units report adversely about a candidate, the District Magistrate may give the candidate a hearing before sending his report."*

16. The importance of the Office Memorandum dated 28.04.1958 was noticed by the Supreme Court in ***Ram Kumar vs. State of U.P. & Others (2011) 14 SCC 709*** which was also considered by the Supreme Court in ***Avtar Singh (Supra)***. In **Ram Kumar (supra)** the candidate had challenged the order of the appointing authority cancelling his selection after he was appointed on the post. The appointing authority had cancelled the selection only on the ground that the applicant had not disclosed in his affidavit that a criminal case under Sections 323/34/504 IPC had been registered against him in which he had been acquitted. The Supreme Court held that in view of the Office Memorandum dated 28.04.1958, it was the duty of the appointing authority to satisfy itself as to whether the applicant was suitable for appointment to the post with reference to nature of suppression and nature of the criminal case. The Supreme Court held that the appointing authority could not have found the applicant unsuitable for appointment merely because the applicant had furnished an affidavit stating incorrectly the facts regarding registration of a criminal case against him even though he was acquitted in the criminal case. The Supreme Court consequently quashed the order of the appointing authority cancelling the selection and appointment of the applicant and directed that that the applicant be reinstated in service. However, the Supreme Court denied back-wages for the period the candidate remained out of service. The relevant observations of the Supreme Court in paragraph nos. 9 to 14 of the report are reproduced below:-

*"9. We have carefully read the Government Order dated 28-4-1958 on the subject "Verification of the character and antecedents of government servants before their first appointment" and it is stated in the government order that the*

*Governor has been pleased to lay down the following instructions in supersession of all the previous orders:*

*"The rule regarding character of candidate for appointment under the State Government shall continue to be as follows:*

*The character of a candidate for direct appointment must be such as to render him suitable in all respects for employment in the service or post to which he is to be appointed. It would be the duty of the appointing authority to satisfy itself on this point."*

*10.* ***It will be clear from the aforesaid instructions issued by the Governor that the object of the verification of the character and antecedents of government servants before their first appointment is to ensure that the character of a government servant for a direct recruitment is such as to render him suitable in all respects for employment in the service or post to which he is to be appointed and it would be a duty of the appointing authority to satisfy itself on this point.***

*11. In the facts of the present case, we find that though Criminal Case No. 275 of 2001 under Sections 324/323/504 IPC had been registered against the appellant at Jaswant Nagar Police Station, District Etawah, admittedly the appellant had been acquitted by order dated 18-7-2002 by the Additional Chief Judicial Magistrate, Etawah.*

*12. On a reading of the order dated 18-7-2002 of the Additional Chief Judicial Magistrate it would show that the sole witness examined before the court, PW 1, Mr Akhilesh Kumar, had deposed before the court that on 2-12-2000 at 4.00 p.m. children were quarrelling and at that time the appellant, Shailendra and Ajay Kumar amongst other neighbours had reached there and someone from the crowd hurled abuses and in the scuffle Akhilesh Kumar got injured when he fell and his head hit a brick platform and that he was not beaten by the accused persons by any sharp weapon. In the absence of any other witness against the appellant, the Additional Chief Judicial Magistrate acquitted the appellant of the charges under Sections 323/34/504 IPC.* ***On these facts, it was not at all possible for the appointing authority to take a view that the appellant was not suitable for appointment to the post of a police constable."***

17. The principles deducible from the judicial precedents referred earlier and also the Office memorandum dated 28.4.1958, so far as they are relevant for a decision of the present writ petition, are that the purpose of seeking information from the candidate regarding any criminal case registered or pending against him is to verify the character and antecedents of the candidate. ***Verification of character and antecedents of a candidate is required to adjudge the suitability of the candidate for appointment.*** Information given to employer by a candidate regarding criminal cases must be true and there should be no

suppression or misrepresentation. However, even a candidate who has suppressed material information has a right not to be dealt with arbitrarily and the decision of the competent authority has to be reasonable and objective having due regards to the facts of the case. ***Broad- brushing every non-disclosure as a disqualification would be unjust and it would be arbitrary and unreasonable to disqualify a candidate merely because of non-disclosure of a criminal case which was trivial in nature and related to a petty offence which if disclosed would not have rendered him unfit for the post in question***. In cases where there is non-disclosure of criminal case by the candidate, the nature of the case and the seriousness of the offence with which the applicant is charged, the end result of the trial as well as the socio-economic strata to which the candidate belongs are some of the factors which are to be considered while adjudging the suitability of a candidate for appointment. In a case trivial in nature or for a petty offence, the employer may ignore suppression of fact or false information by condoning the lapse if the applicant is not otherwise unfit for appointment. Apart from the aforesaid, chance of reformation has to be afforded to young offenders in suitable cases. Conviction in a criminal case would not, in itself, be sufficient to disqualify a candidate and it is the circumstances of conviction which are to be taken into account and the circumstances in which the applicant is presently placed is also to be considered. The report of the District Magistrate regarding the character and antecedents of the candidate and also the recommendations of the District Magistrate are relevant documents which have to be considered by the appointing authority while deciding the suitability of a candidate for appointment. The aforesaid factors are also to be considered by the courts while deciding the nature of relief to be given to a candidate.

18. In the present case, the Joint Secretary has mechanically rejected the claim of the petitioner only on the ground of non-disclosure of criminal cases by the petitioner. While rejecting the claim of the petitioner, the Joint Secretary has not considered the report of the District Magistrate which recommended the petitioner fit for appointment. While deciding the claim of the petitioner, the appointing authority has neither considered the nature of alleged suppression nor the nature of the case registered against the petitioner in which the petitioner was put on trial and the fact that the petitioner was not charge-sheeted in the case registered against him under Section 354(D) I.P.C. read with Section 12 of the POCSO Act. The socio-economic strata to which the petitioner belongs has also not been considered by the Joint Secretary and there is no consideration regarding the suitability of the petitioner for appointment. For the aforesaid reasons, the order dated 11.12.2023 passed by the Joint Secretary is contrary to law and is liable to be quashed.

19. So far as the relief to be granted to the petitioner is concerned, normally in cases where an authority has wrongly exercised its discretion while passing an order, the matter, after quashing the order is remitted back to the authority concerned to pass fresh orders. However, in the present case, the petitioner has been disqualified and has been refused appointment only on the ground of non-disclosure of criminal cases registered against him. In view of the reasons given above, mere non-disclosure of the criminal

cases could not be fatal for the appointment of the petitioner. In view of the aforesaid and also for reasons stated subsequently, no useful purpose would be served to remit back the matter to the Joint Secretary for a fresh decision.

20. The admitted facts in the present case are that two criminal cases were registered against the petitioner. It is not the case of the State respondents that multiple criminal cases were registered against the petitioner. In Case Crime No. 215 of 2018 registered under Sections 354(D) of the Indian Penal Code read with Section 12 of POCSO Act, 2012, the petitioner was not named in the charge-sheet and was not put on trial in the aforesaid case. Though the offence in the aforesaid case involves moral turpitude, the registration of the case cannot be held against the petitioner because the petitioner was not named in the charge-sheet. The petitioner was acquitted in the other case, i.e., Case Crime No. 198 of 2019 registered under Sections 147/ 323/ 325/ 504/ 506 IPC. The petitioner was acquitted in the said case giving benefit of doubt. However, even if the petitioner had been convicted in the case, the said circumstance could not have been held against him to consider his suitability for appointment as the case was trivial in nature and arose out of a petty quarrel between two families. A mere conviction cannot be a disqualification for appointment. It is also the admitted case of the State respondents that the District Magistrate, after noticing the criminal cases certified the character of the petitioner and recommended him for appointment. The petitioner hails from a small town and there is nothing on record to show that the antecedents or character of the petitioner makes him unsuitable for appointment on the post. It is also not the case of the respondents that apart from the indiscretion of the petitioner regarding non-disclosure of the criminal cases, the antecedents and character of the petitioner were such that he would otherwise be unsuitable for appointment on the post of Assistant Review Officer. It is also noticed that the petitioner had subsequently filed an affidavit disclosing the criminal case registered against him. In the circumstances, no intention to deceive the employer can be imputed to the petitioner. In view of the aforesaid, the petitioner is entitled to a relief commanding the State respondents to issue an appointment letter to him for appointment to the post of Assistant Review Officer.

21. For the aforesaid reasons, the order dated 11.12.2023 passed by the Joint Secretary, Secretariat Administration Section - 5 (Establishment), Government of Uttar Pradesh, Lucknow is hereby quashed.

22. The respondents - State authorities, i.e., the Principal Secretary, Secretariat Administration Section – 5 (Establishment), Government of Uttar Pradesh, Lucknow and the Joint Secretary, Secretariat Administration Section – 5 (Establishment), Government of Uttar Pradesh, Lucknow are hereby directed to ensure that appropriate appointment letter is issued to the petitioner appointing him on the post of Assistant Review Officer in pursuance to the recruitment notified in 2021 and the petitioner shall be allowed to join as such. The appointment letter shall be issued to the petitioner by the competent authority within a period of one month from today, and in any case, by 15th December, 2024.

23. It is clarified that the petitioner shall be entitled to the service benefits,

including his pay and other allowances as well as seniority, as a consequence of his appointment, only with effect from the date of his joining.

24. With the aforesaid directions and observations, the writ petition is ***allowed***.

25. A copy of this order be communicated to the Principal Secretary, Secretariat Administration Section – 5 (Establishment), Government of Uttar Pradesh, Lucknow and the Joint Secretary, Secretariat Administration Section – 5 (Establishment), Government of Uttar Pradesh, Lucknow by the Registrar (Compliance) within ten days from today.

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**(2024) 11 ILRA 313**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 06.11.2024**

**BEFORE**

**THE HON'BLE ALOK MATHUR, J.**

Writ -A No. 10219 of 2024

**Hanuman Singh ...Petitioner**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Shiv Pal Singh, Suresh Singh

**Counsel for the Respondents:**
C.S.C.

**Civil Law - Constitution of India, 1950 - Article 226 - Delay and Laches - Petitioner was appointed on 1.1.1984 as a Mali on daily wager. Respondents by means of order dated 3.11.2013 regularized the services of the petitioner from the date the said order was passed i.e.23.11.2013. Petitioner superannuated from the services on 30.4.2024. After his superannuation he started representing that his services deserve to be regularized from 2001 onwards. Held: During his services after passing of the order of regularization no grievance was raised by the petitioner. Petitioner accepted the order of regularization in 2013 and not challenged the order of regularization till the date of his superannuation. Court was of the opinion that the claim of the petitioner suffers from unexplained delay and laches of 11 years, as such, no interference is required in exercise of its extraordinary jurisdiction under Article 226 of the Constitution. (Para 8)**

**Dismissed.** (E-4)

**List of Cases cited:**

1. U.O.I. Vs Tarsem Singh, (2008) 8 SCC 648

2. U.O.I. Vs N Murugesan, (2022) 2 SCC 25

3. Chairman, State Bank of India v. M J James, (2022) 2 SCC 301

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

1. Heard Sri Shiv Pal Singh, learned counsel for the petitioner and the Standing counsel for the respondents.

2. The petitioner has prayed for following reliefs:

> *"(I) Issue a writ, order or direction in the nature of Mandamus thereby commanding and directing the opposite parties to treat the regularization of the services of petitioner w.e.f. 2001 when the regularization rules applicable upon the petitioenr were notified, for the purpose of pensionary benefits with all consequential benefits.*
>
> *(II) Issue a writ, order or direction in the nature of*

*Mandamus thereby commanding and directing the opposite parties to add the services rendered by the petitioner on the daily wages for the purpose of pensionary benefits with all consequential service benefits to the petitioner, in the interest of justice..."*

3. It has been submitted that the petitioner was appointed on 1.1.1984 as a Mali on daily wager Group D post in Horticulture Department, Faizabad under the Superintendent, Government Garden. As his services were not regularized despite his working for substantially long length of time, he had approached thsi Court by filing writ petition bearing Writ Petition No.6615 (S/S) of 2004 where by means of an interim order granted on 5.11.2004 the respondents were directed to consider granting him minimum of pay scale and also for regularization within 8 weeks. As the order of the writ Court was not complied, a contempt petition was preferred being Contempt Petition No.824 (C) of 2005 (Hanuman Singh Vs. Sri Manmohan Sinha, Director, Horticulture) where the proceedings were dropped after recording the statement of the opposite parties that the petitioner shall be paid minimum of pay scale w.e.f. 7.11.2004. The writ petition No. 6615 (S/S) of 2004 was finally allowed by means of order dated 27.5.2013 considering that the petitioner has been working for thirty years, the respondents were directed to create a post in case the same was not available and pass an order regularizing his services within a period of one month. In compliance of the directions of this Court vide order dated 27.5.2013, the respondents by means of order dated 3.11.2013 regularized the services of the petitioner on the post of Mali from the date the said order was passed i.e.23.11.2013. The petitioner continued as a regular employee and finally was superannuated from the services on 30.4.2024.

4. It is only after his superannuation that he started representing against the order of regularization, particularly, with regard to the date of his regularization and representations were submitted on 15.5.2024 and finally the present writ petition has been field seeking a direction that his services deserve to be regularized from 2001 on-wards.

5. Learned Standing counsel, on the other hand, has opposed the writ petition. He has submitted that the grievances of the petitioner with regard to regularization was already canvassed by him by filing two writ petitions before this Court and this Court had duly considered the claim of the petitioner and allowed his writ petition No.6615 (S/S) of 2004 by means of judgment and order dated 27.5.2013. It is on the direction of the writ Court that his services were regularized by means of order dated 23.11.2013 and the petitioner continued on the strength of the said order till the date of his superannuation. He never raised any grievance during currency of his services and after lapse of 11 years, he has filed this writ petition. In the aforesaid circumstances it has been submitted that the petitioner himself has accepted the order dated 23.11.2013 and even in the present writ petition he has only sought a writ of mandamus directing the respondents for consideration of his representation from 2001 on-wards rather than challenging the validity of the order dated 23.11.2013 while the said claim is highly time bared and the petition suffers from unexplained delay and

latched of 11 years and accordingly deserves to be dismissed.

6. I have heard the rival contentions and perused the record.

7. From the aforesaid facts it is clear that the petitioner has been working on the post of Mali since 1984 in Horticulture Department and when his services were not regularized he approached this Court by filing writ petition No.6615 (S/S) of 2004. The said writ petition was allowed by means of judgment and order dated 27.5.2013 directing the respondents to duly consider the claim of the petitioner for regularization and it is in pursuance of the directions issued by this Court that by means of order dated 23.11.2013 the services of the petitioner were regularized w.e.f. from the said date and he continued in services till the date of superannuation in 2024 and raised no grievance with regard to date of regularization. The petitioner has accepted the order dated 23.11.2013 and never represented or raised any grievance regarding the same and eve till date he has not even challenged the validity of the said order but only after his superannuation he has sought further relief of being regularized from 2011 on wards. In the entire writ petition there is no averment with regard to the delay in approaching this Court by filing present writ petition. From the aforesaid facts, it is clear that the petitioner has been vigilant about his rights as a government servant and he has already approached this Court on several occasions seeking right of regularization and it cannot be said that he was not aware of the relevant legal provisions with regard to his rights of regularization.

8. At this point, it is relevant to mention certain judgments of Hon'ble Supreme Court explaining the effect of delay, latches and acquiescence in service matters.

***(1) Union of India v. Tarsem Singh, (2008) 8 SCC 648:***

*"To summarise, normally, a belated service related claim will be rejected on the ground of delay and laches (where remedy is sought by filing a writ petition) or limitation (where remedy is sought by an application to the Administrative Tribunal). One of the exceptions to the said rule is cases relating to a continuing wrong. Where a service related claim is based on a continuing wrong, relief can be granted even if there is a long delay in seeking remedy, with reference to the date on which the continuing wrong commenced, if such continuing wrong creates a continuing source of injury. But there is an exception to the exception. If the grievance is in respect of any order or administrative decision which related to or affected several others also, and if the reopening of the issue would affect the settled rights of third parties, then the claim will not be entertained. For example, if the issue relates to payment or refixation of pay or pension, relief may*

*be granted in spite of delay as it does not affect the rights of third parties. But if the claim involved issues relating to seniority or promotion, etc., affecting others, delay would render the claim stale and doctrine of laches/limitation will be applied. Insofar as the consequential relief of recovery of arrears for a past period is concerned, the principles relating to recurring/successive wrongs will apply. As a consequence, the High Courts will restrict the consequential relief relating to arrears normally to a period of three years prior to the date of filing of the writ petition."*

(emphasis supplied)

***(2) Union of India v. N Murugesan, (2022) 2 SCC 25:***

***"Delay, laches and acquiescence***

20. *The principles governing delay, laches, and acquiescence are overlapping and interconnected on many occasions. However, they have their distinct characters and distinct elements. One can say that delay is the genus to which laches and acquiescence are species. Similarly, laches might be called a genus to a species by name acquiescence. However, there may be a case where acquiescence is involved, but not laches. These principles are common law principles, and perhaps one could identify that these principles find place in various statutes which restrict the period of limitation and create non-consideration of condonation in certain circumstances. They are bound to be applied by way of practice requiring prudence of the court than of a strict application of law. The underlying principle governing these concepts would be one of estoppel. The question of prejudice is also an important issue to be taken note of by the court.*

***Latches***

*21. The word "laches" is derived from the French language meaning "remissness and slackness". It thus involves unreasonable delay or negligence in pursuing a claim involving an equitable relief while causing prejudice to the other party. It is neglect on the part of a party to do an act which law requires while asserting a right, and therefore, must stand in the way of the party getting relief or remedy.*

*22. Two essential factors to be seen are the length of the delay and the*

*nature of acts done during the interval. As stated, it would also involve acquiescence on the part of the party approaching the court apart from the change in position in the interregnum. Therefore, it would be unjustifiable for a Court of Equity to confer a remedy on a party who knocks its doors when his acts would indicate a waiver of such a right. By his conduct, he has put the other party in a particular position, and therefore, it would be unreasonable to facilitate a challenge before the court. Thus, a man responsible for his conduct on equity is not expected to be allowed to avail a remedy.*

*23. A defence of laches can only be allowed when there is no statutory bar. The question as to whether there exists a clear case of laches on the part of a person seeking a remedy is one of fact and so also that of prejudice. The said principle may not have any application when the existence of fraud is pleaded and proved by the other side. To determine the difference between the concept of laches and acquiescence is that, in a case involving mere laches, the principle of estoppel would apply to all the defences that are available to a party. Therefore, a defendant can succeed on the various grounds raised by the plaintiff, while an issue concerned alone would be amenable to acquiescence.*

***Acquiescence***

*24. We have already discussed the relationship between acquiescence on the one hand and delay and laches on the other.*

*25. Acquiescence would mean a tacit or passive acceptance. It is implied and reluctant consent to an act. In other words, such an action would qualify a passive assent. Thus, when acquiescence takes place, it presupposes knowledge against a particular act. From the knowledge comes passive acceptance, therefore instead of taking any action against any alleged refusal to perform the original contract, despite adequate knowledge of its terms, and instead being allowed to continue by consciously ignoring it and thereafter proceeding further, acquiescence does take place. As a consequence, it reintroduces a new implied agreement between the parties. Once such a*

*situation arises, it is not open to the party that acquiesced itself to insist upon the compliance of the original terms. Hence, what is essential, is the conduct of the parties. We only dealt with the distinction involving a mere acquiescence. When acquiescence is followed by delay, it may become laches. Here again, we are inclined to hold that the concept of acquiescence is to be seen on a case-to-case basis."*

(emphasis supplied)

***(3) Chairman, State Bank of India v. M J James, (2022) 2 SCC 301:***

*"36. What is a reasonable time is not to be put in a straitjacket formula or judicially codified in the form of days, etc. as it depends upon the facts and circumstances of each case. A right not exercised for a long time is nonexistent. Doctrine of delay and laches as well as acquiescence are applied to non-suit the litigants who approach the court/appellate authorities belatedly without any justifiable explanation for bringing action after unreasonable delay. In the present case, challenge to the order of dismissal from service by way of appeal was after four years and five months, which is certainly highly belated and beyond justifiable time. Without satisfactory explanation justifying the delay, it is difficult to hold that the appeal was preferred within a reasonable time. Pertinently, the challenge was primarily on the ground that the respondent was not allowed to be represented by a representative of his choice. The respondent knew that even if he were to succeed on this ground, as has happened in the writ proceedings, fresh inquiry would not be prohibited as finality is not attached unless there is a legal or statutory bar, an aspect which has been also noticed in the impugned judgment. This is highlighted to show the prejudice caused to the appellants by the delayed challenge. We would, subsequently, examine the question of acquiescence and its judicial effect in the context of the present case.*

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*38. In Ram Chand v. Union of India [Ram Chand v. Union of India, (1994) 1 SCC 44] and State of U.P. v. Manohar [State of U.P. v. Manohar, (2005)*

*2 SCC 126] this Court observed that if the statutory authority has not performed its duty within a reasonable time, it cannot justify the same by taking the plea that the person who has been deprived of his rights has not approached the appropriate forum for relief. If a statutory authority does not pass any orders and thereby fails to comply with the statutory mandate within reasonable time, they normally should not be permitted to take the defence of laches and delay. If at all, in such cases, the delay furnishes a cause of action, which in some cases as elucidated in Union of India v. Tarsem Singh [Union of India v. Tarsem Singh, (2008) 8 SCC 648 : (2008) 2 SCC (L&S) 765] may be continuing cause of action. The State being a virtuous litigant should meet the genuine claims and not deny them for want of action on their part. However, this general principle would not apply when, on consideration of the facts, the court concludes that the respondent had abandoned his rights, which may be either express or implied from his conduct. Abandonment implies intentional act to acknowledge, as has been held in para 6 of Motilal Padampat Sugar Mills Co. Ltd. v. State of U.P. [Motilal Padampat Sugar Mills Co. Ltd. v. State of U.P., (1979) 2 SCC 409 : 1979 SCC (Tax) 144] Applying this principle of acquiescence to the precept of delay and laches, this Court in U.P. Jal Nigam v. Jaswant Singh [U.P. Jal Nigam v. Jaswant Singh, (2006) 11 SCC 464 : (2007) 1 SCC (L&S) 500] after referring to several judgments, has accepted the following elucidation in Halsbury's Laws of England: (Jaswant Singh case [U.P. Jal Nigam v. Jaswant Singh, (2006) 11 SCC 464 : (2007) 1 SCC (L&S) 500], SCC pp. 470-71, paras 12-13)*

*"12. The statement of law has also been summarised in Halsbury's Laws of England, Para 911, p. 395 as follows:*

*'In determining whether there has been such delay as to amount to laches, the chief points to be considered are:*

*(i) acquiescence on the claimant's part; and*

*(ii) any change of position that has occurred on the defendant's part.*

*Acquiescence in this sense does not mean standing by while the*

*violation of a right is in progress, but assent after the violation has been completed and the claimant has become aware of it. It is unjust to give the claimant a remedy where, by his conduct, he has done that which might fairly be regarded as equivalent to a waiver of it; or where by his conduct and neglect, though not waiving the remedy, he has put the other party in a position in which it would not be reasonable to place him if the remedy were afterwards to be asserted. In such cases lapse of time and delay are most material. Upon these considerations rests the doctrine of laches.'*

*13. In view of the statement of law as summarised above, the respondents are guilty since the respondents have acquiesced in accepting the retirement and did not challenge the same in time. If they would have been vigilant enough, they could have filed writ petitions as others did in the matter. Therefore, whenever it appears that the claimants lost time or whiled it away and did not rise to the occasion in time for filing the writ petitions, then in such cases, the court should be very slow in granting the relief to the incumbent. Secondly, it has also to be taken into consideration the question of acquiescence or waiver on the part of the incumbent whether other parties are going to be prejudiced if the relief is granted. In the present case, if the respondents would have challenged their retirement being violative of the provisions of the Act, perhaps the Nigam could have taken appropriate steps to raise funds so as to meet the liability but by not asserting their rights the respondents have allowed time to pass and after a lapse of couple of years, they have filed writ petitions claiming the benefit for two years. That will definitely require the Nigam to raise funds which is going to have serious financial repercussions on the financial management of the Nigam. Why should the court come to the rescue of such persons when they themselves are guilty of waiver and acquiescence?"*

*39. Before proceeding further, it is important to clarify distinction between "acquiescence" and "delay and laches". Doctrine of acquiescence is an equitable doctrine which applies when a party*

*having a right stands by and sees another dealing in a manner inconsistent with that right, while the act is in progress and after violation is completed, which conduct reflects his assent or accord. He cannot afterwards complain. [See Prabhakar v. Sericulture Deptt., (2015) 15 SCC 1 : (2016) 2 SCC (L&S) 149. Also, see Gobinda Ramanuj Das Mohanta v. Ram Charan Das, 1925 SCC OnLine Cal 30 : AIR 1925 Cal 1107] In literal sense, the term acquiescence means silent assent, tacit consent, concurrence, or acceptance, [See Vidyavathi Kapoor Trust v. CIT, 1991 SCC OnLine Kar 331 : (1992) 194 ITR 584] which denotes conduct that is evidence of an intention of a party to abandon an equitable right and also to denote conduct from which another party will be justified in inferring such an intention. [See Krishan Dev v. Ram Piari, 1964 SCC OnLine HP 5 : AIR 1964 HP 34] Acquiescence can be either direct with full knowledge and express approbation, or indirect where a person having the right to set aside the action stands by and sees another dealing in a manner inconsistent with that right and in spite of the infringement takes no action mirroring acceptance. [See "Introduction", U.N. Mitra, Tagore Law Lectures — Law of Limitation and Prescription, Vol. I, 14th Edn., 2016.] However, acquiescence will not apply if lapse of time is of no importance or consequence.*

*40. Laches unlike limitation is flexible. However, both limitation and laches destroy the remedy but not the right. Laches like acquiescence is based upon equitable considerations, but laches unlike acquiescence imports even simple passivity. On the other hand, acquiescence implies active assent and is based upon the rule of estoppel in pais. As a form of estoppel, it bars a party afterwards from complaining of the violation of the right. Even indirect acquiescence implies almost active consent, which is not to be inferred by mere silence or inaction which is involved in laches. Acquiescence in this manner is quite distinct from delay. Acquiescence virtually destroys the right of the person. [See Vidyavathi Kapoor Trust v. CIT, 1991 SCC OnLine Kar 331 : (1992) 194 ITR 584] Given the aforesaid legal position, inactive*

*acquiescence on the part of the respondent can be inferred till the filing of the appeal, and not for the period post filing of the appeal. Nevertheless, this acquiescence being in the nature of estoppel bars the respondent from claiming violation of the right of fair representation."*

(emphasis supplied)

8. In light of the above, we do not find any reason for the delay in approaching this Court and 11 years is a sufficiently long length of time for filing the present writ petition which is highly time barred and and delayed. Even during his services after passing of the order of regularization no grievance was raised by the petitioner. In any view of the matter, the petitioner had duly accepted the order of regularization in 2013 and accordingly he has not challenged the order of regularization till the date of his superannuation which has clearly fallen out from the order of 23.11.2013.

9. In the aforesaid facts, this Court is of the considered opinion that the claim of the petitioner suffers from unexplained delay and latches of 11 years, as such, no interference is required in exercise of its extraordinary jurisdiction under Article 226 of the Constitution. The writ petition is, thus, **dismissed**.

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**(2024) 11 ILRA 322**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 22.11.2024**

**BEFORE**

**THE HON'BLE ALOK MATHUR, J.**

Writ -C No. 3944 of 2024

**Kapil Misra & Anr. ...Petitioners**
**Versus**
**State of U.P. & Anr. ...Respondents**

**Counsel for the Petitioners:**
Sunil Kumar Chaudhary, Abhishek Khare, Rajendra Kumar Dubey

**Counsel for the Respondents:**
C.S.C., Waseeq Uddin Ahmed

**A. Civil Law – Constitution of India,1950 – Article 300-A – UP Urban Planning and Development Act, 1973 – Planned development – Public interest versus Individual's right – Preference to one of them or strike balance between them – Court's liability – Held, on one hand is right of an individual to make the most profitable use of his property, is a right which is protected under article 300A of the Constitution of India, and on the other hand is the claim of the development authority for a planned development and also to prevent a haphazard development and accordingly the competing rights have to be interpreted in relation to each other. The courts must make an endeavour to strike a balance between public interest on one hand and protection of constitutional rights of an individual to hold property on the other. (Para 34)**

**B. Constitution of India,1950 – Article 300-A – Right to property – Scope – Right to get map sanctioned – Enforceability – Held, right to property includes right to construct on the property owned by a person subject to the applicable regulations made in this regard – To enjoy property is a right which is protected under article 300-A of the constitution of India, and denial of sanction of map, is depriving an individual of his right of property, and the same can be done only with the sanction of law. (Para 37)**

**C. UP Industrial Area Development Act, 1976 – Section 6(f) – Deed of Exchange – Nature – Transfer through the deed of**

**exchange executed by NOIDA – Validity – Held, the NOIDA was competent to execute and transfer land as per the Act of 1976 in as much as it was within their competence to transfer either by be of sale or lease or otherwise plots of land for industrial, commercial or residential purposes. (Para 57)**

**D. UP Urban Planning and Development Act, 1973 – UP Industrial Area Development Act, 1976 – Section 6(f) – Sanction of map – Rejection on the ground of lack of lease deed – Validity challenged – Held, once the land has been transferred by the NOIDA in exercise of powers under Act of 1976, then the transferee would be entitled to have a map sanctioned as per regulations of 2010. Merely because the instrument by which the land has been vested in the petitioner is not a lease deed, cannot be a ground for rejection of the application for sanction of map. (Para 58)**

**E. Interpretation of statute – Expropriatory legislation – Strict interpretation – Application – Held, whenever an interpretation is being made with regard to the provisions of an expropriatory legislation it would be subject to strict interpretation– *Indore Vikas Pradhikaran's case* relied upon. (Para 35)**

**F. Interpretation of statute – Beneficial legislation – Purposive construction – Applicability – The provisions of the statute must be construed so as to make it effective and operative and to further the ends of justice and not to frustrate the same. The court has the duty to construe the statute to promote the object of the statute – *Edukanti Kistamma's case* relied upon. (Para 45)**

**Writ petition allowed.** (E-1)

**List of Cases cited:**

1. T. Vijayalakshmi Vs Town Planning Member; (2006) 8 SCC 502

2. Indore Vikas Pradhikaran Vs Pure Industrial Coke & Chemicals Ltd.; (2007) 8 SCC 705

3. T.Vijayalakshmi & ors. Vs Town Planning Member & anr.; (2006) 8 SCC 502

4. St. of Bombay Vs Bhanji Munji & anr.; (1954) 2 SCC 386

5. Edukanti Kistamma (Dead) through LRs & ors.Vs S. Venkatareddy (dead) through LRs. & ors.; (2010) 1 SCC 756

6. Executive Engineer, Southern Electricity Supply Company of Orissa Limited (Southco) & anr. Vs Sri Seetaram Rice Mill; (2012) 2 SCC 108

7. Paradise Development Vs Chief Town & Country planner; 2017 SCC online All 2744

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

1. Heard Sri Jaideep Narain Mathur, learned Senior Advocate assisted by Sri Sunil Kumar Chaudhary, Sri Abhishek Khare and Ms. Aishvarya Mathur, Advocate for the petitioners as well as learned Standing Counsel for the State respondents and Sri Sanjeev Sen, learned Senior Advocate assisted by Sri Waseequddin Ahmed, learned counsel appearing for New Okhla Industrial Development Authority (hereinafter referred to as "NOIDA").

2. The petitioner has challenged the correctness of the order dated 11/09/2023 passed by the Chief Executive Officer, "NOIDA" whereby he has declined to sanction the map submitted by the petitioner for group housing, as well as the order dated 10/04/2024 passed by the State Government in exercise of power under section 41 (3) of the U.P. Urban Planning and Development Act, 1973 wherein the validity of the order dated 11/09/2023 has been upheld and the revision of the petitioner has been dismissed.

3. The brief facts involved in the present controversy are that the petitioners were joint owners of land measuring 10,870 sq.mtrs situated at khata No. 7 khasra No. 2, Village Rohillapur, sector 132, NOIDA, District Gautam Buddha Nagar. The said land was sought to be acquired by the State Government and notification under section 4 (1) read with section 17 (4) of the Land Acquisition Act, 1894 was issued on 13/02/2006 while the notification under section 6 read with section 17 (1) of the Act of 1894 was issued on 12/06/2006. The aforesaid acquisition proceedings were challenged by the petitioners by filing writ petition No. 18009/2008 before this Court at Allahabad and the aforesaid writ petition which was allowed by means of judgement and order dated 10/08/2009 and the notifications under section 4 and section 6 of the Act of 1894 were quashed.

4. The petitioner filed another writ petition being writ C No. 47873 of 2010 alleging that despite setting aside of the land acquisition proceedings, the NOIDA had started illegal encroachment over the petitioner's land. In the aforesaid circumstances, a prayer was made by the petitioner that in case the removal of the encroachment over the aforesaid land is not possible then the NOIDA may consider allotment of alternative land in lieu of petitioner's land. Considering the rival contentions, this Court by means of judgement and order dated 26/11/2010 had disposed of the said petition with a direction to the NOIDA to decide the representations of the petitioner dated 26/06/2010 and 16/07/2010 and pass speaking orders within a period of 6 weeks from the date of receipt of the order.

5. It is in pursuance of the directions of this Court, a decision was taken by the NOIDA in its 171th Board Meeting and resolved to execute a registered "deed of exchange" by means of which the petitioners would transfer the ownership of their land of sector 132 to NOIDA and in lieu of the same NOIDA will transfer their ownership of its acquired land of the same size to the petitioner situated at village Sadarpur Sector 45 NOIDA, District Gautam Buddha Nagar.

6. Accordingly, a deed of exchange was executed between the petitioner and NOIDA on 26/03/2011 and from the said date the parties became absolute owners of the land given to them by way of deed of exchange with absolute rights to enjoy the said property.

7. The controversy in the present case has arisen when an application was given by the petitioner for sanction of the map on 05/04/2021 in accordance with New Okhla Industrial Development Area Building Regulations, 2010 (hereinafter referred to as "Regulations of 2010") to the Chief Executive Officer NOIDA along with requisite fees. It was further submitted that all the necessary documents along with a copy of the deed of exchange was filed. On 28/07/2021 the opposite party No. 2 informed the petitioners that the Proforma submitted along with the application by the petitioner was incomplete and also that they have not submitted the copies of the plan. Accordingly, the petitioner submitted the plan on 09/08/2021.

8. Despite competing of the formalities, the opposite party No. 2 did not sanction the map, and, therefore, a writ petition was filed by the petitioner being writ petition No. 13466 of 2022 which was disposed of by means of an order dated 11/05/2022 directing the opposite party No.

2 to pass appropriate orders on the application for sanction of map within a period of 45 days. Subsequently due to non-compliance of the order of the court contempt petitioners filed, which led to passing of the order dated 11/09/2023 refusing to grant the building permit to the petitioner. Aggrieved by the order dated 11/09/2023 the petitioner preferred a revision under section 41 (3) Of the Uttar Pradesh Urban Planning and Development Act Read with Section 12 of the Uttar Pradesh Industrial Area Development Act, 1976 and rejected his revision by means of order dated 10/04/2024. The orders dated 11/09/2023 and 10/04/2024 have been impugned by the petitioner present writ petition.

9. While rejecting the application of the petitioner 3 grounds were cited, namely:-

> (i) the land is initially acquired by the NOIDA, and is subsequently allotted for the particular use, which is also mentioned in the lease deed, and thereafter the map is sanction as per the building bye laws of 2010, and all the documents as mentioned in the rules have to be submitted by the applicant.
>
> (ii) The NOIDA after acquisition of land, proceeds to develop the said land and it is only after lease deed is executed the building plan is sanctioned and the purpose of submission of lease deed is that it can be verified that the plan has been submitted by the authorised allottee.
>
> (iii) The applicant, namely Kapil Mishra has not submitted the lease deed but a deed of exchange which is not an authorised document according to the building Regulations 2010 and therefore his papers are not complete and consequently his application for sanction of building plan is rejected.

10. The State Government while passing the order dated 10/04/2024 rejecting the revision of the petitioner and held that in the rules of 2010, in chapter 2 clause 5 (i) provides for submission of documents as per the form given in appendix 1 including possession certificate, lease deed and transfer date. It was held that it is imperative that a lease deed be submitted along with the application for sanction of map along with a transfer memorandum as provided in the Appendix I, which have not been provided by the petitioner and accordingly his revision was rejected.

11. It has been submitted by Sri Jaideep Narain Mathur learned Senior Advocate for the petitioner that the application of the petitioner for sanction of the map has been rejected by the NOIDA on the ground that as per clause 5 of regulations, 2010 read with checklist 1-B of the Appendix it is necessary that a lease deed has to be filed along with the application for sanction of map as per the list of documents required under Check List 1-B, and the petitioner having filed only a deed of exchange and not the lease deed as prescribed, the application was rejected. It was submitted that the land was transferred to the petitioner by exercising the power given under section 6 (f) of the Act, 1976 wherein NOIDA is vested with the power to transfer land not only by selling or executing a lease deed but also it has the power to transfer the land even

otherwise, and hence respondent No. 2 while exercising its power as per the said provision has passed the order dated 28/01/2011 for execution of deed of exchange which is a transfer deed in the eyes of law especially in view of the provisions contained in section 118-120 of The Transfer of Property Act in the case of the petitioner was fully covered under checklist 1-B (i) of appendix 1 and hence the respondents have illegally and arbitrarily rejected the application of the petitioner.

12. With regard to the dispute pertaining to the nature of the land, it was submitted that the respondents themselves admitted in the order dated 11/09/2023 and 10/04/2024 that the plot in question is situated in sector 45 NOIDA, and is a residential area as per the master plan which was acquired and owned by NOIDA and has been transferred in favour of petitioner by a registered deed of exchange in compliance of the orders passed by this court, and therefore such a deed of exchange would qualify to be treated as a transfer deed as per the provisions of Transfer of Property Act, 1882.

13. It was further submitted that the term lease defined under section 105 of The Transfer of Property Act, 1882 and the exchange is defined under section 118 of The Transfer of Property Act, 1882 both deal with the transfer of right of ownership and both the sections refer to the word "transfer" which creates the right of ownership of the property transferred from one party to the other with only difference that under lease, deed limited to the extent defined in the lease deed which is not so in the case of exchange. In Exchange, the rights are transferred absolutely. In this regard it was submitted that any interpretation taken to exclude the deed of exchange demonstrating title was clearly illegal and arbitrary and contrary to the statutory provisions.

14. It was also submitted that the action of the respondents is contrary to the doctrine of "promissory estoppel" and legitimate expectation. The right to property under Article 300A of the Constitution of India having been elevated to the status of human rights is inherent in every individual and thus has to be acknowledged and by no means be belittled by adopting unconcerned nonchalant, malafide and discriminatory action by the respondents which is a state instrumentality. It was further submitted that section 19 of the Act of 1976 confers power of the Authority to make regulations with previous approval of the State Government, but the regulations cannot be read in a manner so as to deprive the petitioner of the lawful use of the land on ground that they are not referable to any provision of the UP Industrial Area Development Act, 1976.

15. It was finally submitted that the respondents have acted in the most illegal and arbitrary manner, and interpreted the provisions of The U.P. Industrial Area Development Act, 1976 and the regulations made thereunder erroneously, thereby depriving the petitioner of his valuable right protected under Article 300A of the Constitution of India and merely because the checklist does not include a deed of exchange the respondents have illegally and arbitrarily rejected the application of the petitioner. It was submitted that the petitioner is a solitary case for such a rejection of the map, and accordingly in this regard the respondents have adversely discriminated

the petitioner and the action is clearly violative of article 14 of the Constitution of India.

16. Sri Sanjiv Sen, learned Senior Advocate appearing on behalf of NOIDA has vehemently opposed the writ petition. It has been submitted that the previous land was held by the petitioner in village Rohillapur on which agricultural activity was being carried out, and similar land at Sardarpur was given to the petitioner by NOIDA in exchange for land originally held by them. It was contended that the petitioner could not have been sanctioned map for any building on their original land situated at village Rohillapur because the same was a private land, and also because it was unplanned and undeveloped, and it had to be acquired by the NOIDA first, subsequent to which a development would have to be sanctioned, and therefore for the same reason, no sanction can be granted to the land subsequently allotted to him in Sardarpur.

17. With regard to the argument of the petitioner that Village-Sardarpur falls within sector 45 where the predominant land use is marked as residential, it was submitted by the respondents that land use is designated for a parcel of land only once it is acquired by NOIDA and development is planned on it. It was further submitted that the land currently owned by the petitioner is raw, unplanned, underdeveloped and no land use has been designated to it and therefore cannot be said to be residential in nature.

18. Much emphasis was laid by the respondents on the interpretation of 'The U.P Industrial Area Development Act, 1976' And the 'NOIDA Building Regulations' to canvass the issue that the transfer of land in favour of the petitioner by means of a deed of exchange would not be sufficient in itself to sanction the map, in as much as the mandatory requirement would be a lease deed executed by the NOIDA , and only thereafter, the map can be sanctioned.

19. It was submitted that as per section 6 of the Act of 1976 the object of the authorities to secure the planned development of the industry development area for which purposes the NOIDA has to firstly acquire the land as per section 6(2)(a) of the said Act, and subsequently to prepare a plan for planned development of the industrial development area which involves demarcating parcels of land to be developed in accordance with the plan, and therefore it was submitted that sanction of building plans over land on which no planning has taken place cannot be granted.

20. It was further submitted that according to section 9 of Act of 1976 no person can erect any building in the industry developing area in contravention of any building regulation. The entire area of land acquired by NOIDA so far stands at 12460 ha, while the master plan for 2031 envisages the acquisition of entire developable land of 15280 ha, therefore the remaining 2820 ha of land is yet to be acquired. It was stated that the petitioners land is not part of 2820 ha and is therefore not eligible to be developed at this point of time. It was lastly submitted that the nature of petitioner's land was that of a private land and as such map cannot be sanctioned on a private land by the NOIDA authorities. Reliance was placed upon the judgement of this court in the case of Paradise developer vs Chief Town & Country planner and others reported in 2017 SCC online ALL 2744

21. Rebutting the contention of the petitioner it was contended that the petitioner is not a "transferee" under the Act of 1976. As per section 2 (f) of the act of 1976 has been defined as follows:-

> *'Transferee' means a person (including a firm or other body of individuals whether incorporated or not to whom any land or building is transferred in any manner whatsoever, under this act and includes his successors and assigns,*

22. It was submitted that the functions of the authority as provided in section 6 will also clearly indicate that the object of the authorities is to secure planned development of the industrial development area for which purpose the authority can transfer land as per subclause (f) which is as follows :-

> *"6(2)(f) to allocate and transfer either by way of sale or lease or otherwise plot of land for industrial commercial or residential purposes"*

23. Apart from the above it was submitted that as per section 7 of the act of 1976 provides specific power to transfer the land in the following terms:-

> *"7. The authority may sell, lease or otherwise transfer whether by auction, allotment or otherwise any land or building belonging to the Authority in the industrial development area on such terms and conditions as it may, subject to any rules that may be made under this Act think fit to impose"*

24. Considering the aforesaid provisions of the Act of 1976 it was submitted that the plain reading of section 7 implies that NOIDA can sell, lease or otherwise transfer by auction, allotment or otherwise any land or building belonging to the authority. Thus, NOIDA cannot transfer land which it does not own. The exchange, which was entered into, in the present case, was in accordance with the powers conferred upon the NOIDA under section 7 as NOIDA transferred the land which belonged to it in village Sardarpur. It was emphasised that after the exchange, the land is in exclusive ownership of the petitioners.

25. It was further submitted that the words "transfer" or "transferee" have to be read in terms of the Act of 1976, as referring to transfer of secondary rights by an allottee/Lessee of NOIDA to third party, with the prior approval of NOIDA through tripartite agreement to which NOIDA is a party. Therefore, according to the respondents transfer can only have a limited connotation for the purposes of the Act of 1976, and hence no private development can be sanctioned in NOIDA.

26. Lastly, it was submitted that NOIDA does not levy property tax on land falling within NOIDA and the NOIDA is wholly dependent upon lease rentals, lease premium, transfer charges (where applicable) and other charges levied through the terms of its lease deed for allotted properties, for revenue to maintain civil services and amenities. This model of revenue collection necessitates that all of the development in NOIDA be carried out under the aegis of NOIDA on the land owned by NOIDA. In case the petitioner is permitted to develop the land as prayed by

him then exchequer would suffer substantial loss.

27. We have heard the rival submissions at length. The dispute in the present case relates to the right of the petitioner to get the map sanctioned pertaining to the land which was given to the petitioner situated at village Sardarpur in exchange of the land purchase by the petitioner in village Rohillapur.

28. The facts in the present case are not in dispute, inasmuch as the petitioner was the owner of the land situated at village-Rohillapur which was sought to be acquired by the State Government and given to NOIDA for development. The said acquisition proceedings were set aside, and the ownership of the land came to be vested in the petitioner alone. Despite acquisition proceedings having been set aside, it seems that detrimental activities are carried on by the NOIDA contrary to the judgement of the High Court, and therefore another writ petition was filed by the petitioner in this regard being writ petition No. 47873 of 2010, and noticing that the said land was in fact been utilised by the NOIDA authorities for development option has been given to them to give an equivalent land to the petitioner and accordingly decide the representation in this regard.

29. The NOIDA authorities in their 171st board meeting held on 25/02/2011 resolved to execute a registered deed of exchange by which the petitioners were to transfer the ownership of the land of sector 132 NOIDA (Rohillapur) and in lieu of the same, the NOIDA were to transfer the ownership of the acquired land of the same size situated at village Sardarpur, Sector 45 NOIDA. In light of the said board resolution, a deed of exchange was executed on 26/03/2011.

30. The petitioners submitted an application for sanctioning of map on 05/04/2021 which was rejected on the ground that the said application did not include the lease deed which is an essential document as per the list 1-B of Appendix 1 of the Regulations of 2010. The revision before the State Government was also rejected by means of order dated 10/04/2024. It is the case of the respondents that in the present case after execution of a deed of exchange in favour of the petitioners, the status of the land of the petitioners is akin to a private holding on which no map can be sanctioned.

31. Accordingly, the question for this Court for consideration is as to whether the map of the petitioner was wrongly rejected, or whether he fulfilled all the conditions prescribed under the U.P Industrial Area Development Act, 1976 and regulations framed so that his map can be sanctioned.

32. To consider the aforesaid question, it has also to be considered whether the ownership documents as provided for in checklist 1-B of appendix 1 of the regulation of 2010 would include a deed of transfer, or in absence of lease deed the NOIDA would be within its competence to reject the application for sanction of map.

33. NOIDA is an industrial development authority constituted by the State Government of Uttar Pradesh in exercise of its powers under Section 3 of U.P. Act No. 6 of 1976. Authority under this Act can be constituted for any industrial development area and such areas

would be those which have been declared as such by notification by the State Government. The object of the industrial development authority, as is evident from Section 6 of the Act, is to secure planned development of the industrial development areas. Its functions include providing infrastructure for industrial, commercial or residential purposes as also to allocate and transfer either by way of sale or lease or otherwise, plots of land for the aforesaid purposes.

34. To consider the rival contentions it is necessary to bear in mind that on one hand is right of an individual to make the most profitable use of his property, is a right which is protected under article 300A of the Constitution of India, and on the other hand is the claim of the development authority for a planned development and also to prevent a haphazard development and accordingly the competing rights have to be interpreted in relation to each other. The courts must make an endeavour to strike a balance between public interest on one hand and protection of constitutional rights of an individual to hold property on the other. The aspect of balancing of both the rights was duly considered by the Supreme Court in the case of ***T. Vijayalakshmi v. Town Planning Member, (2006) 8 SCC 502*** when it was observed as under:

> **"15**. *The law in this behalf is explicit. Right of a person to construct residential houses in the residential area is a valuable right. The said right can only be regulated in terms of a regulatory statute but unless there exists a clear provision the same cannot be taken away. It is also a trite law that the building plans are required to be dealt with in terms of the existing law. Determination of such a question cannot be postponed far less taken away. Doctrine of legitimate expectation in a case of this nature would have a role to play."*

35. Undoubtedly, where in any area the Act of 1976 comes into operation and notification ensues bringing the said area within the development area, the right of the owner to use the property stands restricted, and would be subject to the provisions of the Act of 1976 along with New Okhla Industrial Development Area Building Regulations, 2010. Whenever an interpretation is being made with regard to the provisions of an expropriatory legislation it would be subject to strict interpretation. This aspect of the matter was dealt at length of the Supreme Court in the case of ***Indore Vikas Pradhikaran v. Pure Industrial Coke & Chemicals Ltd., (2007) 8 SCC 705:***

> ***Interpretation of the Act***
>
> *57. The Act being regulatory in nature as by reason thereof the right of an owner of property to use and develop stands restricted, requires strict construction. An owner of land ordinarily would be entitled to use or develop the same for any purpose unless there exists certain regulation in a statute or statutory rules. Regulations contained in such statute must be interpreted in such a manner so as to least interfere with the right to property of the owner of such land. Restrictions are made in larger public interest. Such restrictions,*

*indisputably must be reasonable ones. (See Balram Kumawat v. Union of India [(2003) 7 SCC 628] ; Krishi Utpadan Mandi Samiti v. Pilibhit Pantnagar Beej Ltd. [(2004) 1 SCC 391] and Union of India v. West Coast Paper Mills Ltd. [(2004) 2 SCC 747] ) The statutory scheme contemplates that a person and owner of land should not ordinarily be deprived from the user thereof by way of reservation or designation.*

*58. Expropriatory legislation, as is well-known, must be given a strict construction.*

*59. In Hindustan Petroleum Corpn. Ltd. v. Darius Shapur Chenai [(2005) 7 SCC 627] construing Section 5-A of the Land Acquisition Act, this Court observed: (SCC pp. 634-35, para 6-7)*

*"6. It is not in dispute that Section 5-A of the Act confers a valuable right in favour of a person whose lands are sought to be acquired. Having regard to the provisions contained in Article 300-A of the Constitution, the State in exercise of its power of 'eminent domain' may interfere with the right of property of a person by acquiring the same but the same must be for a public purpose and reasonable compensation therefor must be paid.*

*7. Indisputably, the definition of public purpose is of wide amplitude and takes within its sweep the acquisition of land for a corporation owned or controlled by the State, as envisaged under sub-clause (iv) of Clause (f) of Section 3 of the Act. But the same would not mean that the State is the sole judge therefor and no judicial review shall lie. (See Jilubhai Nanbhai Khachar v. State of Gujarat [1995 Supp (1) SCC 596] .)"*

*It was further stated: (SCC p. 640, para 29)*

*"29. The Act is an expropriatory legislation. This Court in State of M.P. v. Vishnu Prasad Sharma [AIR 1966 SC 1593] observed that in such a case the provisions of the statute should be strictly construed as it deprives a person of his land without consent. [See also Khub Chand v. State of Rajasthan [AIR 1967 SC 1074] and CCE v. Orient Fabrics (P) Ltd. [(2004) 1 SCC 597] ]There cannot, therefore, be any doubt that in a case of this nature due application of mind on the part of the statutory authority was imperative."*

*In State of Rajasthan v. Basant Nahata [(2005) 12 SCC 77 : JT (2005) 8 SC 171] it was opined: (SCC p. 102, para 59)*

*"In absence of any substantive provisions contained in a parliamentary or legislative act, he cannot be refrained from dealing with his property in any manner he likes. Such statutory interdict would be opposed to one's right of property as envisaged under Article 300-A of the Constitution."*

*In State of U.P. v. Manohar [(2005) 2 SCC 126] a Constitution Bench of this*

*Court held: (SCC p. 129, paras 7-8)*

*"7. Ours is a constitutional democracy and the rights available to the citizens are declared by the Constitution. Although Article 19(1)(f) was deleted by the Forty-fourth Amendment to the Constitution, Article 300-A has been placed in the Constitution, which reads as follows:*

*'300-A. Persons not to be deprived of property save by authority of law.—No person shall be deprived of his property save by authority of law.'*

*8. This is a case where we find utter lack of legal authority for deprivation of the respondent's property by the appellants who are State authorities."*

*In Jilubhai Nanbhai Khachar v. State of Gujarat [1995 Supp (1) SCC 596] the law is stated in the following terms: (SCC p. 622, para 34)*

*"34. The right of eminent domain is the right of the sovereign State, through its regular agencies, to reassert, either temporarily or permanently, its dominion over any portion of the soil of the State including private property without its owner's consent on account of public exigency and for the public good. Eminent domain is the highest and most exact idea of property remaining in the Government, or in the aggregate body of the people in their sovereign capacity. It gives the right to resume possession of the property in the manner directed by the Constitution and the laws of the State, whenever the public interest requires it. The term 'expropriation' is practically synonymous with the term 'eminent domain'."*

*It was further observed: (SCC p. 627, para 48)*

*"48. The word 'property' used in Article 300-A must be understood in the context in which the sovereign power of eminent domain is exercised by the State and property expropriated. No abstract principles could be laid. Each case must be considered in the light of its own facts and setting. The phrase 'deprivation of the property of a person' must equally be considered in the fact situation of a case. Deprivation connotes different concepts. Article 300-A gets attracted to an acquisition or taking possession of private property, by necessary implication for public purpose, in accordance with the law made by Parliament or a State Legislature, a rule or a statutory order having force of law. It is inherent in every sovereign State by exercising its power of eminent domain to expropriate private property without owner's consent. Prima facie, State would be the judge to decide whether a purpose is a public purpose. But it is not the sole judge. This will be subject to judicial review and it is the duty of the court to determine whether a particular purpose is a public purpose or not. Public interest has always been considered to be an essential ingredient of public purpose. But every public purpose does not fall under Article 300-A nor every exercise of eminent*

*domain an acquisition or taking possession under Article 300-A. Generally speaking preservation of public health or prevention of damage to life and property are considered to be public purposes. Yet deprivation of property for any such purpose would not amount to acquisition or possession taken under Article 300-A. It would be by exercise of the police power of the State. In other words, Article 300-A only limits the powers of the State that no person shall be deprived of his property save by authority of law. There has to be no deprivation without any sanction of law. Deprivation by any other mode is not acquisition or taking possession under Article 300-A. In other words, if there is no law, there is no deprivation. Acquisition of mines, minerals and quarries is deprivation under Article 300-A."*

*Rajendra Babu, J. (as the learned Chief Justice then was) in Sri Krishnapur Mutt v. N. Vijayendra Shetty [(1992) 3 Kar LJ 326] observed: (Kar LJ p. 329, para 8)*

*"8. The restrictions imposed in the planning law though in public interest should be strictly interpreted because they make an inroad into the rights of a private person to carry on his business by construction of a suitable building for the purpose and incidentally may affect his fundamental right if too widely interpreted."*

*60. The question has also been addressed by a decision of the Division Bench of this Court in Pt. Chet Ram Vashist v. Municipal Corpn. of Delhi [(1995) 1 SCC 47] , wherein R.M. Sahai, J., speaking for the Bench opined: (SCC p. 54, para 6)*

*"6. Reserving any site for any street, open space, park, school, etc. in a layout plan is normally a public purpose as it is inherent in such reservation that it shall be used by the public in general. The effect of such reservation is that the owner ceases to be a legal owner of the land in dispute and he holds the land for the benefit of the society or the public in general. It may result in creating an obligation in nature of trust and may preclude the owner from transferring or selling his interest in it. It may be true as held by the High Court that the interest which is left in the owner is a residuary interest which may be nothing more than a right to hold this land in trust for the specific purpose specified by the coloniser in the sanctioned layout plan. But the question is, does it entitle the Corporation to claim that the land so specified should be transferred to the authority free of cost. That is not made out from any provision in the Act or on any principle of law. The Corporation by virtue of the land specified as open space may get a right as a custodian of public interest to manage it in the interest of the society in general. But the right to manage as a local body is not the same thing as to claim transfer of the property to itself. The effect of transfer of the property is that the transferor ceases to be owner of it and the ownership stands transferred to the person in whose favour it is*

*transferred. The resolution of the Committee to transfer land in the colony for park and school was an order for transfer without there being any sanction for the same in law."*

36. In the present case, the petitioner claims that his application for sanction of a building map has been wrongfully rejected by the respondent authority. The reason for rejection is that the petitioner is not entitled for being sanctioned the said map as per the regulations of 2010, and specially that he could not produce the lease deed which according to the respondents is mandatory condition for sanctioning of the map. There is no dispute that the petitioner is the owner of the property, the same having been transferred in his favour by the respondents by means of a deed of exchange executed between them on 26/03/2011. By the said deed of exchange the petitioners became the absolute owners of the property. The property which is transferred to the petitioner was previously acquired by the State Government for the NOIDA, and as the original land of the petitioner was utilised by the NOIDA for its development purposes.

37. Right to property includes right to construct on the property owned by him subject to the applicable regulations made in this regard. In **T.Vijayalakshmi and others vs. Town Planning Member and another (2006) 8 SCC 502** it was held by the Apex Court that the right to property would include right to construct a building. Such a right, however, can be restricted by legislation, which must stand test of reasonableness. The right to property has also been included as human right and is part of right to development, which is in turn has been held to be right to life guaranteed under Article 21 of the Constitution of India. To enjoy property is a right which is protected under article 300-A of the constitution of India, and denial of sanction of map, is depriving an individual of his right of property, and the same can be done only with the sanction of law.

38. To determine the legality and validity of the impugned orders passed by NOIDA as well as the State Government, the provisions of law which are applicable for sanction of the map deserves scrutiny to examine the reasons given for rejection of the map and to determine whether the same are supported by the statutory and regulatory provisions.

39. According to section 2(f) of The U.P. Industrial Area Development Act, 1976, transferee has been defined to mean a person (including a firm or other body of individuals whether incorporated or not to whom any land or building is transferred in any manner whatsoever, under this Act and includes his successors and assigns). Section 6 provides for the functions of the authority which include acquisition of land in the industry development area, to prepare a plan for development of the industrial area, to demarcate and develop sites for industrial, commercial and residential purpose according to the plan and sub clause (f) provides to allocate and transfer either by way of sale or lease or otherwise plots of land for industry, commercial or residential purposes.

40. Section 7 of the Act provides for the power to the authority in respect of transfer of land according to which the authority may sell, lease or otherwise transfer, whether by auction, allotment or otherwise any land or building belonging to

the authority in the industrial development area on such terms and conditions as it may, subject to any rules that may be made under the Act think fit to impose.

41. A conjoint reading of the aforesaid provisions indicate that the authority has been given sufficient powers and discretion to sell the land to the transferee either through a lease or by an auction, allotment any other method any land belonging to the authority in the industry area. The arguments of the respondents that the land belonging to the authority can be transferred only by a lease deed is clearly not supported by the aforesaid statutory provisions. Section 7 is very clear in its terms which gives wide power to the authority to "transfer" the land of the authority. The transfer of land can be effected by selling, leasing or otherwise transferring the land of the authority, through the process of auction, allotment or otherwise. Therefore on careful examination of the words is used in section 7 we do not find that they restrict the authority to transfer the land of the authority to any individual or corporate by only leasing the said land, but it can transfer the land in any other manner possible because the words "otherwise transfer" used in section 7 will have to be liberally interpreted as it unequivocally indicates the intention of the legislature which is to provides for transfer of the land by "sell or "lease". In case the intention of the legislature was to restrict the transfer of the land through "lease" only, as vehemently argued by Senior counsel for the respondent, then the words "otherwise transfer" would be rendered meaningless and redundant. While interpreting any statute the intention of the legislature must be gathered from all the words used in the enactment, and all the words have to be given it's due and proper meaning in the context they have been used. Accordingly, the authority was within its competence to "transfer" the land through a deed of exchange.

42. The action of the respondents in rejecting the application for sanction of map may amount to deprivation of the right to enjoy the property which according to the petitioner is his Constitutional right as per article 300-A of the Constitution of India. In this regard it would be relevant to consider that deprivation is to be distinguished from restriction of the rights following from ownership. The Hon'ble Apex Court in the case of **State of Bombay Vrs. Bhanji Munji & Anr**., reported in (1954) 2 SCC 386, has observed that substantial deprivation is meant the sort of deprivation that substantially robs a man of those attributes of enjoyment which normally accompany rights to, or an interest in, property. The form is unessential. It is the substance that [one] must seek, for the ready reference, paragraph-6 & 7 of the said judgment is being referred as under:-

> *"6. In State of W.B. v. Subodh Gopal Bose [State of W.B. v. Subodh Gopal Bose, (1953) 2 SCC 688 : 1954 SCR 587] and Dwarkadas Shrinivas v. Sholapur Spg. & Wvg. Co. Ltd. [Dwarkadas Shrinivas v. Sholapur Spg. & Wvg. Co. Ltd., (1953) 2 SCC 791 : 1954 SCR 674] the majority of the Judges were agreed that Articles 19(1)(f) and 31 deal with different subjects and cover different fields. There was some disagreement about the nature and scope of the difference but all were agreed that there was no overlapping. We need*

*not examine those differences here because it is enough to say that Article 19(1)(f) read with clause (5) postulates the existence of property which can be enjoyed and over which rights can be exercised because otherwise the reasonable restrictions contemplated by clause (5) could not be brought into play. If there is no property which can be acquired, held or disposed of, no restriction can be placed on the exercise of the right to acquire, hold and dispose of it, and as clause (5) contemplates the placing of reasonable restrictions on the exercise of those rights it must follow that the article postulates the existence of property over which these rights can be exercised. In our opinion, this was decided in principle in Gopalan case [A.K. Gopalan v. State of Madras, 1950 SCC 228 : 1950 SCR 88] where it was held that the freedoms relating to the person of a citizen guaranteed by Article 19 assume the existence of a free citizen and can no longer be enjoyed if a citizen is deprived of his liberty by the law of preventive or punitive detention. In the same way, when there is a substantially total deprivation of property which is already held and enjoyed, one must turn to Article 31 to see how far that is justified.*

*7. It was argued as against this that this rule can only apply when there is a total deprivation of property and Article 19(1)(f) cannot be excluded if there is the slightest vestige of a right on which the article can operate. This has also been answered in substance in Dwarkadas Shrinivas v. Sholapur Spg. & Wvg. Co. Ltd. [Dwarkadas Shrinivas v. Sholapur Spg. & Wvg. Co. Ltd., (1953) 2 SCC 791 : 1954 SCR 674] These articles deal with substantial and substantive rights and not with illusory phantoms of title. When every form of enjoyment which normally accompanies an interest in this kind of property is taken away leaving the mere husk of title, Article 19(1)(f) is not attracted. As was said by one of us in Dwarkadas Shrinivas v. Sholapur Spg. & Wvg. Co. Ltd. [Dwarkadas Shrinivas v. Sholapur Spg. & Wvg. Co. Ltd., (1953) 2 SCC 791 : 1954 SCR 674] at SCC p. 831, para 44:*

*"44. ... By substantial deprivation [is meant] the sort of deprivation that substantially robs a man of those attributes of enjoyment which normally accompany rights to, or an interest in, property. The form is unessential. It is the substance that [one] must seek."*

43. In light of the aforesaid discussion the other question which arises for determination is as to whether a deed of exchange would be a transfer deed as provided for in checklist-1B of the regulations of 2010 as a valid document of ownership.

44. A transfer deed has not been defined either in the Act of 1976 or in the regulations of 2010. Checklist 1-B (i) provides for submission of ownership documents which is followed by semi colon, and further provides details or lists

of the instruments of ownership like copies of allotment letter, possession certificate, the lease deed (transfer deed case of transfer), and dimension plans issued by the authority which have to be submitted along with application of sanction of map. The respondents have urged that the aforesaid provisions should be interpreted in a manner where only a lease deed would be the only relevant document pertaining to the ownership of the property which necessarily has to be submitted before consideration of the application for sanction of map. The counsel for the petitioner on the other hand has submitted that the provisions with regard to the sanction of map have to be liberally interpreted in sync with the object of the legislation which is to secure a planned development and not to deprive any individual of his rights over the property.

45. In this regard it is necessary to take into account the judgments of the Supreme Court:-

45.1 The Hon'ble Apex Court in the case of ***Edukanti Kistamma (Dead) through LRs & Ors. Vrs. S. Venkatareddy (dead) through LRs. & Ors [(2010) 1 SCC 756],*** at paragraph 26 held as under:

> *"26. ..... Interpretation of a beneficial legislation with a narrow pedantic approach is not justified. In case there is any doubt, the court should interpret a beneficial legislation in favour of the beneficiaries and not otherwise as it would be against the legislative intent. For the purpose of interpretation of a statute, the Act is to be read in its entirety. The purport and object of the Act must be given its full effect by applying the principles of purposive construction. The court must be strong against any construction which tends to reduce a statute's utility. The provisions of the statute must be construed so as to make it effective and operative and to further the ends of justice and not to frustrate the same. The court has the duty to construe the statute to promote the object of the statute and serve the purpose for which it has been enacted and should not efface its very purpose....."*

45.2 Similarly, the Hon‟ble Apex Court in the case of ***Executive Engineer, Southern Electricity Supply Company of Orissa Limited (Southco) & Anr. Vs. Sri Seetaram Rice Mill [(2012) 2 SCC 108]***, at paragraph 46 and 49 has been pleased to hold as under:

> *"46. "Purposive construction" is certainly a cardinal principle of interpretation. Equally true is that no rule of interpretation should either be overstated or overextended. Without being overextended or overstated, this rule of*

*interpretation can be applied to the present case. It points to the conclusion that an interpretation which would attain the object and purpose of the Act has to be given precedence over any other interpretation which may not further the cause of the statute. The development of law is particularly liberated both from literal and blinkered interpretation, though to a limited extent.*

*49. Once the Court decides that it has to take a purposive construction as opposed to textual construction, then the legislative purpose sought to be achieved by such an interpretation has to be kept in mind……."*

46. It is evident from the provision as contained under Article 300-A, whereby and whereunder, no person shall be deprived of his property save by authority of law. The word 'deprive' as contained therein and for the purpose of depriving a person from the property right, the same can only be done under the authority of law.

47. In the present case, the right to occupy the premises has gone as also the right to transfer, assign, let or sub-let. What is left is but the mere husk of title in the leasehold interest : a forlorn hope that the force of this law will somehow expend itself before the lease runs out."

48. Article 31(1) [the "Rule of law" doctrine] and not Article 31(2) [which had embodied the doctrine of Eminent Domain]. Article 300A enables the State to put restrictions on the right to property by law. That law has to be reasonable. It must comply with other provisions of the Constitution. The limitation or restriction should not be arbitrary or excessive or what is beyond what is required in public interest. The limitation or restriction must not be disproportionate to the situation or excessive. The legislation providing for deprivation of property under Article 300A must be "just, fair and reasonable" as understood in terms of Articles 14, 19(1)(g), 26(b), 301, etc. Thus, in each case, courts will have to examine the scheme of the impugned Act, its object and purpose.

49. Keeping in view the judgement of the Supreme Court, at the very outset it is noticed that The Uttar Pradesh Industrial Area Development Act, 1976 by which the NOIDA has been created does not place any restriction of the nature is sought to be imposed on the petitioner. Section 8 of the said act gives the power to the authority to issue directions for the purposes of proper planning and development of the industry development area. For convenience section 8 is reproduced hereunder:-

*<u>Power of issue directions in respect of creation of building</u>*

*8. (1) For the purposes of proper planning and development of the industrial development area, the authority may issue such direction as it may consider necessary, regarding. Chief Executive Officer Staff of the or Authority Function of the Authority Power to the Authority in respect of transfer of land Power of issue directions in respect of creation of building*

*(a) architectural features of the elevation or frontage of any building;*

*(b) the alignment of buildings on any site;*

*(c) the restrictions and conditions in regard to open spaces to be maintained in and around buildings and height and character of buildings;*

*(d) the number of residential buildings that may be erected on any site;*

*(e) Regulations of erections of shops, workshops, warehouses, factories or buildings;*

*(f) maintenance of height and position of walls, fences, hedges or any other structure or architecture constructions;*

*(g) maintenance of amenities;*

*(h) restrictions of use of any site for a purpose other than that for which it has been allocated;*

*(i) the means to be provided for proper*

*(i) drainage of waste water*

*(ii) disposal of industrial waste, and*

*(iii) disposal of town refuse.*

*(2) Every transferee shall comply with the directions issued under sub-section (1) and shall as expeditiously as possible erect and building or take such other steps as may be necessary to comply with such directions.*

50. From a bare perusal of the above it is clear that the subjects on which directions can be passed by the authority have been delineated in clause (a) to (h) which are confined to the details of the buildings proposed and the features which would be essential for such building. There is no reference in section 8 to any essential attributes pertaining to the ownership of property or the type of document which must be presented to demonstrate title. In subclause (2) it has been provided that the transferee must comply with the directions issued by the authority.

51. Section 9 of the act of 1976 provides for injunction against the individuals from erecting or buying any building in the area in contravention of the building regulations made under subsection (2), which in turn provides for framing of the regulations by the authority with the prior approval of the State Government, and the matters on which such regulations can be made have also been provided. For ready reference section 9 is quoted hereinbelow: -

*<u>Ban on erection of building in contravention of regulations</u>*

*9. (1) No person shall erect or occupy any building in the industrial development area in contravention of any building regulation made under sub-section (2).*

*(2) The Authority may by notification and with prior approval of the State Government make regulations to regulate the erection of buildings and such regulations may provide for all or any of the following matters, namely*

*(a) The materials to be used for external and partition walls, roofs, floors and other parts of a buildings and their position or*

*location or the method of construction;*

*(b) Lay out plan of the building whether industrial, commercial or residential;*

*(c) the height and slope of the roofs and floors of any building which is intended to be used for residential or cooking purposes;*

*(d) the ventilation in, or the space to be left about any building or part there of to secure circulation of air or for the prevention of fire;*

*(e) the number and height of the storeys of any building;*

*(f) the means to be provided for the ingress and egress to and form any building;*

*(g) the minimum dimensions of rooms intended for use as living rooms or sleeping rooms and the provisions of ventilation;*

*(h) any other matter in furtherance of the proper regulation of erection, completion and occupation of buildings and*

*(i) the certificates necessary and incidental to the submission of plans amended plans and completion reports.*

52. It is an exercise of powers conferred under section 9 (2) of Act of 1976 the New Okhla Industrial Development Area Building Regulations, 2010 were framed and were notified on 30/11/2010. Clause 2.4 defines an applicant to mean:-

*2.4 'Applicant' means the person who has legal title to a land or building and includes,*

*(i) An agent or trustee who receives the rent on behalf of the owner;*

*(ii) An agent or trustee who receives the rent of or is entrusted with or is concerned with any building devoted to religious or charitable purposes;*

*(iii) A receiver, executor or administrator or a manager appointed by any Court of competent jurisdiction to have the charge, or to exercise the rights of the owner; and*

*(iv) A mortgagee in possession*

53. The relevant provisions pertaining to layout/building permit and occupancy are provided for in clause 4.0 and 5.0 which are as follows:-

*4.0 Building permit -- No person shall erect any building or a boundary wall or fencing without obtaining a prior permit thereof, from the Chief Executive Officer or an Officer authorized by the Chief Executive Officer for this purpose.*

*5.0 Application for building permit –*

*(1) Every person who intends to erect a building within the Industrial Development Area shall give application in the Form given at Appendix –*

*(2) The application for building permit shall be accompanied by documents as mentioned in checklist annexed to Appendix – 1.*

*(3) Such application shall not be considered until the applicant has paid the fees mentioned in Regulation no. 10.*

54. In appendix -1 contains the checklist 1-B which provides for application for buildings other than those on individual residential plots, the relevant extract of which is as follows:-

> *CHECKLIST -1 B (For buildings other than those on individual residential plots)*
>
> *(i) Ownership documents; copies of allotment letter, possession certificate, the lease deed (transfer deed in case of transfer), and dimension plan issued by the authority.*

55. In the present case the reasons for rejection of the application of the petitioners for sanction of the map is that no lease deed has been provided by the petitioner to demonstrate his title and he has submitted a deed of exchange entered between the petitioners and the NOIDA is which demonstrates that the petitioners are in exclusive ownership of the property. This according to the respondents disentitles him from raising any construction on the disputed property.

56. The petitioners undoubtedly would be included in the definition of "applicants" as per clause 2.4 of the regulations of 2010 as they have a legal title to the property in dispute, and this fact is not contested by the respondents. Once the petitioners are held to be applicants, as per regulations of 2010, then they have a right to submit the application for sanction of the building plan. The documents which accompany the application are firstly the ownership documents as provided for in checklist 1-B of appendix 1 and apart from other documents an applicant has to submit lease deed (transfer deed in case of transfer). The petitioner has submitted a deed of exchange along with the application. It has been submitted on behalf of the respondents that the NOIDA in the usual course of business execute lease deed in favour of the allottee, and any subsequent transaction is only through a transfer deed if permitted by NOIDA.

57. A transfer deed is a legal document that is used to transfer ownership of a property from one person to another. The NOIDA executed a deed of exchange in favour of the petitioner in exercise of power under section 6 (f) of the Act of 1976 to transfer the disputed property in favour of the petitioner in 2011. The transfer of land by through a deed of exchange is undisputed and even otherwise the NOIDA was competent to execute and transfer land as per the Act of 1976 in as much as it was within their competence to transfer either by be of sale or lease or otherwise plots of land for industrial, commercial or residential purposes. We do not find any restriction on limitation on the right of the NOIDA to transfer the land in the development area only through the lease deed and not any other transfer deed including deed of exchange. Once the land has been transferred favour of the petitioner, they become the transferee and entitled for making an application for sanction of map. We even find that as per regulation 2.4 the petitioner would be included in the definition of an "applicant", and accordingly this would also entitle him to prefer an application for sanction of map. The arguments of the respondents to the contrary seeking to deny status of transferee to the petitioner, are not supported by the by statutory provisions, and accordingly rejected.

58. While interpreting the provisions of regulations of 2010, the objective would be to make it effective and

operative and to further the ends of justice and not to frustrate the same. The court has the duty to construe the statute to promote the object of the statute and serve the purpose for which it has been enacted and should not efface its very purpose. It has fairly been submitted by the learned counsel for the respondent that this is the only case so far for the NOIDA where an application has been rejected only because it is not accompanied by lease deed. The regulations of 2010 contain machinery provisions which have been framed by the NOIDA for the effective discharge of duties vested under the Act of 1976, and to promote the objects delineated therein. The regulations cannot create or extinguish a substantial vested right of any individual which is not relatable to any of the matters provided for under section 9(2) of Act of 1976. Merely because regulations can be framed to provide for the documents necessary and incidental for submission of plans as per sub clause (i) of section 9(2), cannot be interpreted or utilised to efface the vested right of an individual of his right of property to get his map sanctioned. The regulations will have to be interpreted having due consideration to the substantial provisions contained in the parent legislation, which is the Act of 1976, and in any case no interpretation can be made which runs counter to the special provisions of the parent legislation. Once we have already held that the deed of exchange was validly executed by NOIDA, though in the discretion they could have transferred it through lease deed, or a Sale deed etc., but their wisdom they resolved to execute a deed of exchange cannot be questioned. The land which was transferred to the petitioner was the acquired land, and not any land which was purchase by the petitioner from a private party. Whatever rights vest in the disputed land with the petitioner, have been granted by NOIDA. Once the land has been transferred by the NOIDA in exercise of powers under Act of 1976, then the transferee would be entitled to have a map sanctioned as per regulations of 2010. Merely because the instrument by which the land has been vested in the petitioner is not a lease deed, cannot be a ground for rejection of the application for sanction of map.

59. The respondents have relied upon the judgement of division bench of this court in the case of ***Paradise Development versus Chief Town & Country planner reported in 2017 SCC online All 2744***. The grievance of the petitioners in the said case was with regard to the rejection of the layout plan on the ground that the land on which the layout plan was being sought to be approved, was shown as "industrial and partly green" in the master plans, and accordingly the 1st issue decided by the division bench was that even if the land has been declared to be "abadi" still it does not in any manner permit the tenure holder to use such land for development of residential colony unless the same has been shown in a master plan as such.

60. The land in the said case was situated in village Illabas which was shown as "agriculture" in the master plan – 2001, master plan – 2011 and master plan – 2021 and accordingly the Division bench of the was of the view that the land falls in the agricultural land use zone as per map in which development of residential colony was not permissible and accordingly he dismiss the writ petition.

61. The learned Senior Advocate appearing on behalf of the respondents has placed reliance on the observations of the

Division bench in paragraph, 29 of the said judgement the Act of 1976 does not permit acquisition of land and its development straight away by a private builder.

62. In the case of Paradise Development, the petitioner therein had purchased land in dispute under different sale deeds during the year 1979 –89, and submitted its layout plan in the name of Vikrant Vihar. The grievance raised by the petitioners therein was with regard to the communication dated 18/04/1990 informing the petitioner that the said village has been notified to be part of NOIDA and accordingly a no objection certificate regarding the development could not be given by the Chief Town & Country planner. Subsequently the NOIDA was also directed to consider the plan submitted by the petitioner therein, which was also rejected on 17/12/2004 on the ground that the land in question was shown as "industrial and partly green" in the master plan and accordingly on such a land of residential building could not be sanctioned.

63. The other ground on which the NOIDA had rejected the application for sanction of the building plan in the said case was that by implication, the provisions of the said Act do not permit acquisition of land and its development directly by "Private builder".

64. The Division bench duly considered the arguments of NOIDA and accepted its order of rejection of the application for sanction of building plan holding that the land on which the plan was sought to be sanctioned is recorded as agriculture on which no residential colony was permissible.

65. The facts in the present case are clearly distinguishable, inasmuch as the land on which the petitioner is seeking sanction of the building plan has been shown as "residential" in the Master Plan as distinguished from "industrial or greenbelt" in the case of paradise development where the application for sanction of map was rejected on the ground that the land use was not "residential" on which no group housing scheme could be approved.

66. The petitioner cannot be called a "private developer" in as much as the land was transferred in his favour by the NOIDA. The instrument by which the land was transferred was the sole choice and prerogative of the NOIDA as per their 171st Board resolution. No reasons have been given by NOIDA for entering into a deed of exchange and not a lease deed. In any view of the matter in the present case the land has been transferred by the NOIDA into the hands of the petitioner and they have not acquired the same from any private individual. There is no dispute that for the purposes of construction/development of the plots allotted private developer, who purchase the land from NOIDA after paying premium for the land which is equivalent to the cost of the land are permitted to raise construction as per law after approval of map. We see no difference between a person who has been allotted land by NOIDA and the petitioner who has been given land through a deed of exchange for raising construction.

67. In the present case there is no dispute that in the master plan the land of the petitioner has been shown as land reserved for residential purposes, and therefore the facts of the instant case are clearly distinguishable from the facts in the

case of Paradise Development where approval of map was sought on green belt.

68. It was submitted on behalf of the respondents that the lease deed should provide the details of the nature of the land as to whether it is residential, commercial or green area while in the case of the petitioner there is no mention about the nature of land in the deed of exchange, and therefore, the disputed land cannot be held to be residential. Though this aspect was not dealt with or considered in the impugned order, but as it is argued by the learned Counsel for the respondents it deserves consideration. The instrument of transfer of immovable property may be lease deed or a sale deed should contain essential features and details including the purpose of the deed, the details of the parties involved in the agreement, description of property, consideration, signatures of the parties and finally the instrument is registered. We do not find that there is any mandatory or statutory requirement about there being any recital mentioning about the nature of land in the said deeds as to whether it is residential, commercial or a green area. Even the relevant Act and regulations of the respondents are silent in this regard and therefore it cannot be said that because the deed of exchange does not mention the nature of land, the petitioners cannot claim the status of the said land to be residential. The nature of land is provided in the master plan prepared for development as per Act of 1976. We do not find merit in the arguments of the respondents and is accordingly rejected.

69. It was further argued that as only lease rent is recovered from the lessees, and the NOIDA authorities do not levy any property tax, and therefore they do not have any other source of income to maintain the NOIDA area, and therefore the petitioner cannot be permitted to raise any construction, as it would cause huge financial loss to the NOIDA in case there are directed to sanction the building map.

70. To consider the arguments of the learned Senior Advocate appearing for the respondents, we have perused the provisions of U.P Industrial Area Development Act, 1976. Section 11 of the Act of 1976 which provides for levy of tax, and the authority with the previous approval of the State Government has the power of levy such taxes as it may consider necessary in respect of any site of building on the transferee or occupied thereof provided that the total incidence of such tax shall not exceed 1% of the market value of such site including the site of the building. Section 13 provides for imposition of penalty and mode of recovery of arrears of rent or any other amount due on account of the transfer of the site of building by the authority. Therefore, sufficient powers have been vested with the NOIDA to levy tax with the prior approval of the State Government, and therefore the argument of the learned counsel for the respondent seems to be incorrect to the extent that only lease rent can be levied and collected by NOIDA. The Act of 1976 provides sufficient powers to levy taxes, and as it by the learned counsel the respondent that the only income of the authority is through realisation of the lease deed and in case they are directed to sanction the map in absence of the property having been transferred on lease they will incur huge loss, seems to be incorrect. We find the substantial powers have been vested in the authority to levy and realised tax, and in case they have not levied any other tax, is as per their discretion, but it cannot be a

ground for non-consideration of an application for sanction of map that a lease deed has not been entered into by the NOIDA, and they will incur huge loss in case there are directed to sanction such a map. Accordingly, merely because NOIDA has have not entered into a lease deed with the petitioner, cannot be a ground for denial of permission to raise construction. The said reason though not recorded in the impugned order is illegal and arbitrary and contrary to provisions of Act of 1976 and therefore rejected.

71. The functions of the authority as stated in Section 6 of the Act of 1976 are to secure a planned development of the industrial development area. To achieve planned development, they have been given the power to acquire land, prepare a plan, to demarcate and develop sites for various purposes, to provide infrastructure, to allocate and transfer the land, to regulate the erection of buildings and to lay down the purpose for which particular site of plot shall be used.

72. The functions as provided for under Section 6 have to be carried out over the "industrial development area" which has been defined under section 2(d) of the Act of 1976 to mean an area declared as such by the State Government by notification. Once the area has been notified to be an industrial development area by the State Government and the powers and functions of the NOIDA as provided in section 6 of the said Act comes into operation and it is only land in the notified area which can be acquired, and plans made for proper and planned development of the said area.

73. To make the provisions of the Act of 1976 more effective and to secure its objects of a planned development in the development area the authority has a right to issue directions in respect of erection of buildings as provided in section 8, and further as per section 9 no person shall erect or occupy any building in the industry development area in contravention of any building regulations. Section 6A further empowers the authority to authorise any person to provide or maintain or continue to provide or maintain any infrastructure amenities under the Act and to collect tax or fee, levied. Accordingly, they have been given the power to authorise collection of tax or fee.

74. Therefore, the scheme of the Act indicates that the authority has been given wide powers akin to a local/municipal authority. The powers of the authority would run as per the provisions of Act of 1976 within the confines of the area notified by the State Government as "industrial development area". It is within the development area that land can be acquired by the authority and the buildings have to be constructed as per the provisions contained in the regulations made thereunder. We do not find that authority is under any obligation to acquire the entire notified industrial development area, but from the date of notification any buildings proposed or made in the development area would be subject to the building bye-laws framed by the authority under section 9 (2). Though we find substance in the arguments of the respondents to the extent that for proper development the land has to be acquired and developed according to the master plan and Zonal plan prepared by the authority. Considering the fact that land parcels owned by marginal farmer are small in size and scattered, after the acquisition they have to be consolidated and after the

process of rectangulation a proper development scheme is to be framed otherwise it will lead to haphazard development, which will be contrary to regular and planned development. For the said purpose the land must be acquired by the authority, followed by the preparation of development plan, and subsequently allotted after realising the development charges and the cost of land etc. We are concerned by the fact that even after the passage of more than 4 decades the entire land in the notified area has not been acquired, and on the other hand the authority would not sanction the building plans in the areas where the land has not been acquired. In fact, the area in which the development is proposed by the authority in the notified area ought to be acquired within a reasonable period of time. During this period the authority would be justified in not sanctioning the building plans on the ground that the said areas are proposed to be developed as per the plans prepared by the authority. But in case the land in the notified area is not acquired within a reasonable period, the rejection of the building plans would clearly be illegal and arbitrary and would be violative of Article 300A of the Constitution of India.

75. In the present case, the facts are peculiar and probably the only solitary instance, as stated by the respondents, where, by a deed of exchange, the land has been allotted to the petitioner. Prior to allotment to the petitioner, the said land was acquired by the authority, and also shown in the master plan for residential purposes. It is only after following the entire procedure, the land was allotted, and it is on the said land that an application for sanction of the building plan was made by the petitioners. In the aforesaid circumstances, we do not find any reason for the authority not to consider the application of the petitioner for sanction of the building plan, and the reasons for rejection, as already discussed, are clearly illegal and arbitrary.

76. Accordingly, for the reasons stated herein-above, the writ petition is **allowed**. The impugned orders dated 11.09.2023 and 10.04.2024 are quashed.

77. The matter is remitted to respondent No.2 to pass a fresh order considering the application for sanction of map on merits in light of the Regulations of 2010 treating the petitioner to be eligible for due consideration and sanction of the map, in accordance with law. Let the fresh exercise be carried out expeditiously, but not later than 4 weeks from the date a certified copy of this order is produced before him.

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**(2024) 11 ILRA 346**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 22.11.2024**

**BEFORE**

**THE HON'BLE SAUMITRA DAYAL SINGH, J.**
**THE HON'BLE DONADI RAMESH, J.**

Writ -C No. 33687 of 2021

**Dinesh Ahuja @ Chinu & Anr.** **...Petitioners**

**Versus**

**D.M. & Ors.** **...Respondents**

**Counsel for the Petitioners:**
Nitin Sharma

**Counsel for the Respondents:**
Abhitab Kumar Tiwari, C.S.C., Vinay Khare, Vivek Saran

**A. Civil Law – Maintenance and Welfare of Parents and Senior Citizens Act, 2007 – Object and Scope – Senior citizen's right of eviction – Imposing restriction to the right guaranteed under the Statute – Permissibility – Held, the Act and the**

**Rules offer a life preserving protective umbrella to all the aged members of the society, who may feel victimized or helpless at the hands of their children, or their relatives & ors., both with respect to provision for maintenance allowance and with respect to protection of their properties. Once that protection has been granted, there is no reason to restrict its operation – Held further, summary proceeding may remain subject to the out come of any civil suit wherein larger issues and other rights may be involved – High Court disagreed with *Ravi Shankar's case* (Patna High Court) and *Simrat Randhawa's case* (Punjab and Haryana High Court) – *Krishna Kumar's case* was also held distinguishable as it relate to Ch. II, not Ch. V of the Act. (Para 30, 31 and 33)**

**B. Civil Law – Maintenance and Welfare of Parents and Senior Citizens Act, 2007 – S. 22 – UP Maintenance and Welfare of Parents and Senior Citizens Rules, 2014 – R. 21 – Allegation of initiation of proceeding by the father (F) as proxy proceeding for the benefit of elder son (S1) – Reliability – No material in support of allegation – Effect – Held, merely because 'S1' may either be neutral to the dispute between 'F' and 'S2' and / or merely because 'S1' may be supporting 'F' in his dispute with 'S2', it may not lead to the conclusion as suggested by learned counsel for the petitioner – High Court found the objection of the petitioner misconceived. (Para 22 and 23)**

**Writ petition dismissed.** (E-1)

**List of Cases cited:**

1. Krishan Kumar Vs St. of U.P. & ors.; 2023:AHC-LKO:54220 decided on 18.08.2023 : 2023 9 ADJ 113

2. Simrat Randhawa Vs St. of Pun. & ors.; 2020 Supreme (P & H) 5

3. Smt. S. Vanitha Vs The Deputy Commissioner Bengaluru Urban District and Ors.; 2021 (15) SCC 730

4. Letters Patent Appeal No. 907 of 2023 in Civil Writ Jurisdiction Case No. 7851 of 2022; Ravi Shanker & anr. Vs St. of Bihar & ors. decided on 03.01.2024

5. Sau Rajani Vs Sau Smita & anr.; 2022 INSC 805

6. Shivani Verma Vs St. of U.P. ors.; 2023 (6) ADJ 496

7. Harcharan Singh Vs Bhagat Singh & ors.; 2019 (2) R.C.R. (Civil) 313

(Delivered by Hon'ble Saumitra Dayal Singh, J. & Hon'ble Donadi Ramesh, J.)

1. Mediation offered to the parties has failed. Accordingly, the matter has been proceeded

2. Heard Sri Nitin Sharma, learned counsel for the petitioners; Sri Vivek Saran, learned counsel for the private respondent and Ms. Kritika Singh, learned Additional Chief Standing Counsel for the State respondents.

3. Present writ petitions has been filed for the following relief :-

> *(i) Issue a writ, order or direction in the nature of certiorari quashing the order dated 22.11.2021 (Annexure No.5 to this instant writ petition) passed by the Additional City Magistrate (Brahmpuri), Meerut (Respondent No.2) in Case No.4925 of 2021 (Computerized Case No.D202111520004925) title Inderjeet Ahuja versus Dinesh Ahuja @ Chinu and another, under Section 7(1) U.P. the Maintenance and Welfare of Parents and Senior Citizens Act, 2007.*
>
> *(ii) Issue a writ, order or direction in the nature of*

*mandamus directing the respondent authority not to take any coercive action against the petitioners in pursuance of the order dated 22.11.2021.*

*(iii) Issue a writ, order or direction in the nature of mandamus directing the respondent authority not to interfere in the peaceful possession of the premises of the petitioners.*

4. The factual matrix giving rise to the present writ petition is undisputed. The petitioner Dinesh Ahuja (herein after described as 'S2') is the younger son of respondent no.3 Indrajeet Ahuja (hereinafter referred to as 'F'). 'F' has another son (elder) born to him, namely, Hemant Ahuja (hereinafter described as 'S1'). It is also admitted to the parties that 'F' (along-with his sons 'S1' and 'S2' and their wives) is residing in the dwelling house described as House No.689/56, (Old No.B-99), Jwala Nagar, Sabun Godaam, Police Station T.P. Nagar, Meerut City, District Meerut (hereinafter described as 'property'). At present 'F' and 'S1' and his wife and family enjoy good relations to the extent there is no litigation between those parties, inter se. At the same time it does appear that petitioner 'S2' and his wife have fallen apart with 'S1' and his family. The petitioners allege that 'F' is acting in collusion and/or under the undue influence of 'S1' and his family. As a result, at the instigation and prompting offered by 'S1' and his family, 'F' instituted a proceeding under Section 22 of the Maintenance and Welfare of Parents and Senior Citizens Act, 2007 (hereinafter referred to as 'Act') read with Rule 21 of the Uttar Pradesh Maintenance and Welfare of Parents and Senior Citizens Rules, 2014 (hereinafter referred to as 'Rules'), on 24.09.2021.

5. Further, according to the petitioners, that proceeding was instituted by 'F' only to defeat the earlier suit proceedings instituted by the petitioner / 'S2' being O.S. No.837 of 2020, (Dinesh Ahuja versus Indrajeet Ahuja and another) seeking an injunction against 'F' and 'S1'. That suit proceeding is described to be pending. At the same time, no injunction has been granted in such proceedings.

6. In the proceedings instituted under Section 22 of the Act read with Rule 21 of the Rules, the petitioners appeared and filed their objections on 08.11.2021. It is their grievance that their objections have been wrongly rejected, and erroneously, a direction has been issued to evict the petitioners from the property in question.

7. In such facts, Sri Nitin Sharma, learned counsel for the petitioners has primarily raised three submissions. First, it has been submitted that the application filed by 'F' under Section 22 of the Act read with Rule 21 of the Rules is a proxy litigation at the behest and instigation of 'S1'. 'F' has no grievance with the petitioners. Only for reason of other disputes existing between 'S1' and 'S2', 'F' has been needlessly dragged into the situation, at the behest of 'S1'.

8. Second, it has been submitted, no proceeding may have been instituted under the Act read with the Rules seeking eviction simplicitor of the petitioners. At most, 'F' would have a right to seek right to claim maintenance allowance from such of his sons who may inherent to his property. Only in the event of default in payment of maintenance allowance if any awarded, a proceeding for eviction may follow. In the present facts, neither 'F' has claimed any maintenance allowance from the petitioners

nor there pre-exists any order providing for such maintenance allowance. In support of his submission, learned counsel for the petitioner has relied on a decision of a learned single judge of this Court in ***Krishan Kumar versus State of U.P. & Ors. (Neutral Citation No. - 2023:AHC-LKO:54220) decided on 18.08.2023 in Writ Petition No.35884 of 2019 (2023 9 ADJ 113)***, wherein it has been observed as below :-

> *"29. Further, this court is of considered opinion that a Tribunal, under Chapter-II of Act, 2007 cannot direct eviction simplicitor from the property at the instance of senior citizens, though the Tribunal can direct the children and relatives to make available a residence to such senior citizens in pursuance of an application, filed under the abovesaid chapter. It further emerges that the District Magistrate as an appellate authority under the Act, 2007, can ensure that no one should make any hindrance to a senior citizen to enjoy the property as per his 'need' and the right to eviction is the last step, where such authority finds that the need of a senior citizen is not being fulfilled. The case in hands is that the present petitioner is living in one room with his wife and he is not making any hindrance in the peaceful living of the parents, in other part of the house and therefore, so far as the objective of the Act, 2007 is concerned, is no way hampered by the petitioner."*

9. Then reliance has been placed on another decision of a learned single judge of the Punjab and Haryana High Court in **Simrat Randhawa versus State of Punjab & Others [2020 Supreme (P & H) 5],** wherein a learned single judge of the Punjab and Haryana High Court declared unconstitutional the Comprehensive Action Plan (CAP in short), framed by the Punjab State Government under the provisions of the Act. Thus, a learned single judge of the Punjab and Haryana High Court reached the conclusion that there was no power vested under the Act and the delegated legislation arising thereunder, in support of eviction simplicitor from any immovable property, at the instance of the senior citizen who may be the owner of such property. To the same effect reliance has been placed on a decision of Supreme in ***Smt. S. Vanitha versus The Deputy Commissioner Bengaluru Urban District and Ors. [2021 (15) SCC 730]***, wherein in the context of parallel proceedings having arisen under the Protection of Women from Domestic Violence Act, 2005 at the instance of a daughter-in-law of a senior citizen (seeking eviction from her property), the Supreme Court set aside the orders passed by the authorities under the Act and the Rules framed thereunder and thus protected the occupant daughter-in-law from her eviction from such premises.

10. Last, he has relied on a decision of a Division Bench of Patna High Court in ***Ravi Shanker and another versus State of Bihar and others, Letters Patent Appeal No.907 of 2023 in Civil Writ Jurisdiction Case No.7851 of 2022, decided on 03.01.2024***, wherein following the Punjab and Patna High Court ***Simrat Randhawa versus State of Punjab & Others (supra) and Smt. S. Vanitha versus The Deputy Commissioner Bengaluru Urban District and Ors. (supra)***, the Patna High Court has also ruled against eviction

simplicitor being offered at the instance of a senior citizen, under the provisions of the Act and Rules framed thereunder.

11. Third, it has been submitted that in any case, the proceedings under the Act and the Rules are summary in nature. Natural jurisdiction of the Civil Courts has neither be excluded nor eclipsed nor restricted. In face of civil suit seeking injunction instituted by the petitioner No.1/'S2' prior to the institution of application under the Act read with the Rules framed thereunder and in face of such suit proceedings being pending, specifically with respect to the property in dispute, no jurisdiction survived with the authorities constituted under the Act and the Rules framed thereunder to proceed to pass any order to evict the petitioners during pendency of O.S. No.837 of 2020, (Dinesh Ahuja versus Indrajeet Ahuja and another) pending in the court of Civil Judge (S.D.), Meerut. Again reliance has been placed on the above noted decisions specially in ***Smt. S. Vanitha (supra)*** and ***Ravi Shanker and another (supra)***. Reliance has also been placed on another decision of Supreme Court in ***Sau Rajani versus Sau Smita & another, 2022 INSC 805.***

12. On the other hand, Sri Vivek Saran, learned counsel for the respondent would submit that there is no collusion between 'F' and 'S-I'. 'F' has instituted the proceedings on his own account with respect to his own property for reason of his own grievance against 'S2'. Merely because 'S1' is not opposed to 'F' and merely because 'S1' may be supporting 'F' generally in life and specifically in the litigation between 'F' and 'S2', it may not be said-that therefore there exists collusion between 'F' and 'S1'. These being family disputes and parties being closely related, it is not an uncommon occurrence that a parent may have no grievance with one of his two more children or that they may have grievance with another child. For reason of absence of grievance between the father of his first son / 'S1', it cannot be said that the father is acting under the influence of his first son or that the proceeding instituted by the father is a proxy litigation on behalf of his first son. No material or evidence exists on record in support of that objection raised by learned counsel for the petitioner.

13. Coming to the second point raised by learned counsel for the petitioner, it has been submitted that the issue is no longer res integra. Insofar as our court is concerned, the issue was squarely thrashed out by a co-ordinate bench in ***Shivani Verma vs. State of U.P. and 4 others, 2023 (6) ADJ 496***. In that decision the co-ordinate bench had the occasion to take note of the comprehensive of CAP framed by Government of U.P. in the context of the Act and the Rules. For ready reference and useful to our discussion, we may note that the co-ordinate bench observed as below :-

> *"51. Chapter IV of the Rules 2014, mandates for providing the scheme for management of old age homes for indigent senior citizens.*
>
> *52. Chapter V, relevant for the purposes of the instant writ petition, provides for duties and power of the District Magistrates. The relevant portion of Rule 21 of Rules 2014, is extracted:*
>
> *"21. Duties and Power of the District Magistrate- (1) The District Magsitrate shall perform the duties and exercise the powers*

*mentioned in sub-rules (2) and (3) so as to ensure that the provisions of the Act are properly carried out in his district.*

*(2) It shall be the duty of the District Magistrate to:*

*(i) ensure that life and property of senior citizens of the district are protected and they are able to live with security and dignity."*

*53. On bare perusal the Sub-rule (i) of Sub-rule (2) of Rule 21, it employs the expression 'property' which is referable to the definition of 'property' defined under Sub-clause (f) of Section 2 of Act 2007. In other words, the expression 'residence', has not been employed in the Rules 2014. Though 'property' would include residential property but would certainly not include or mean the residence sought for maintenance by the senior citizen. The provision for residence could include property owned by the senior citizen or that of his children or relative as the case that may be setup by the senior citizen before the Tribunal claiming maintenance.*

*54. Further, Rules 2014 does not confer on the District Magistrate explicit power of eviction of the occupants from the residence of the senior citizen, though, it confers power upon the District Magistrate to ensure that the 'life and property' of the senior citizen is protected and they are able to live securely with dignity.*

*55. The State Government vide Government Order dated 21 March 2006, in purported exercise of powers under Sub-section (2) of Section 22 of Act 2007, has framed policy for the senior citizen. The relevant portion reads thus:*

*विषयः उ.प्र. राज्य वरिष्ठ नागरिक नीति के सम्बन्ध में। महोदय, उपर्युक्त विषय के सन्दर्भ में यह कहने का निर्देश हुआ है कि प्रदेश के ग्रामीण व शहरी क्षेत्र के वरिष्ठ नागरिकों की समस्याएं अलग-अलग हैं, यथा-स्वास्थ्य सेवाओं की अनुपलब्धता एवं गिरते स्वास्थ्य के कारण दैनिक कार्यों के साथ-साथ जीविकोपार्जन की समस्या परिवार के अन्य सदस्यों के रोजगार हेतु बाहर चले जाने पर उनके स्वयं की देख-भाल करने की समस्या, अधिक आयु एवं शारीरिक असमर्थता के कारण स्वयं की देख-भाल न कर पाने की स्थिति में किसी अन्य के सहायक न होने की समस्या, अधिक उम्र के कारण सक्रियता एवं गतिशीलता कम होने से एकाकीपन की समस्या इत्यादि। वरिष्ठ नागरिकों को विभिन्न सुरक्षा उपायों एवं कार्यक्रमों के माध्यम से शांतिपूर्वक, सुरक्षित एवं सम्मानजनक ढंग से जीवन-यापन का अवसर देने के उद्देश्य से प्रदेश के शहरी एंव ग्रामीण क्षेत्र के वरिष्ठ नागरिकों हेतु मा. मंत्रीपरिषद के आदेश अशासकीय पत्र सं० 4/2/3/2016-सी.एक्स. (1), दिनांक 14 मार्च, 2016 के क्रम में "उ.प्र. राज्य वरिष्ठ नागरिक नीति" निम्नवत बनायी जाती है-1. उत्तर प्रदेश राज्य वरिष्ठ नागरिक नीति के उद्देश्य निम्नवत् होंगे- प्रदेश के वरिष्ठ नागरिकों की आर्थिक सुरक्षा, आवासीय सुविधा, उनके समग्र कल्याण तथा उनकी आवश्यकताओं की पूर्ति हेतु यथावश्यक सहयोग की व्यवस्था सुनिश्चित करना। दुर्व्यवहार एवं शोषण से उनकी रक्षा की व्यवस्था सुनिश्चित करना।*

*56. Paragraph 2.4 of the policy with regard to the 'protection of life and property' reads thus:*

*वरिष्ठ नागरिकों को जीवन एवं सम्पत्ति का भय प्रायः तीन तरह के व्यक्तियों यथा-स्वयं के परिवार से, सेवाकारों से तथा अपराधीगण से होता है। सम्पत्ति की चाह में परिवारीगण से, अकेले रहने की दशा में घरेलू नौकरों से एवं सुनसान अकेले घरों में रहने के कारण घूमने वाले अपराधियों से वरिष्ठ नागरिक आसानी से शिकार हो जाते हैं। अतः समाज के उक्त श्रेणी के लोगों से वरिष्ठ नागरिक एवं उनकी सम्पत्ति की सुरक्षा किया जाना आवश्यक है। सड़क दुर्घटना भी वरिष्ठ नागरिक के लिए घातक है तथा इससे भी वद्धजनों की सुरक्षा की जानी आवश्यक है।*

*वरिष्ठ नागरिकों के जीवन एवं सम्पत्ति की सुरक्षा हेतु कदम उठाए जाएंगे।*

*57. Most of the senior citizens live with their parents (sic children). They face tussle over inheritance or division of property. Elders come under intense pressure to sell off their property or transfer ownership to their sons and are subjected to various forms of abuse if they relent. Senior citizens face harassment and threat from neighbours, encroachment of property, etc.*

*58. In the event, property of a senior citizen as defined under Sub-clause (f) of Section 2 of Rules 2014, is under threat from any person, District Magistrate has been conferred power to protect the life and property of the senior citizen.*

*59. Property can be tangible items, viz., homes, cars or appliances or it can refer to intangible items that carry the promise of future worth, such as, stock and bond certificates. Intellectual property refers to idea such as logo, design and patents.*

*60. Chapter V, in particular, Section 22, read with, Rule 21(2)(i) and the Government action plan/policy framed by the State Government, it mandates and directs the District Magistrate/District Police officers to protect the property of the senior citizen. Protection of property without the power and authority of eviction would render the provision meaningless. Protection of property would certainly include the power to order eviction of the occupant and restoration of the property to the senior citizen.*

*61. The question that follows is which kind of property and against whom. Any kind of property [Section 2(f))] in the possession or threat of dispossession by the senior citizen from the relatives, family member, helps, service providers or anti social/criminals. Family members would include children of senior citizen. The senior citizen in respect of such property other than covered under maintenance (residence), would have to approach the District Magistrate for protection.*

*62. In other words, the expression 'property' would not include the property claimed by the senior citizen for 'maintenance' before the Tribunal for provision of residence. Accordingly, a senior citizen seeking maintenance, other than monetary maintenance, i.e., only residence to the exclusion of his children and relative of a property in his possession or otherwise owned by him, the remedy for such property (residence) would lie before the Tribunal.*

*63. In this backdrop, it follows that protection of 'life and property' would confer implicit power upon the District Magistrate to evict unauthorized occupant of the property, including, children/relative or third party from the property of the senior citizen. However, Tribunal alone would have power to order eviction from the property of a senior citizen/parent on an application claiming maintenance towards*

*residence to the exclusion of his children/grand-children.*

*64. The senior citizen while making an application (Form A) before the Tribunal may claim only residence as maintenance for his need to enable him to lead a normal and peaceful life, irrespective of the plea that his children/relatives are subjecting the senior citizen to harassment or not. The plea of harassment is not a prerequisite to maintain an application for an order of maintenance for provision for residence. In the event, Tribunal if (sic) satisfied on the claim of the senior citizen, it would order maintenance for residence, that would necessarily include eviction of the occupant of the residence being a consequence of the maintenance order. [Rule 14] In other words, Tribunal while exercising powers on an application seeking maintenance of residence by a senior citizen, while making order of maintenance for provision of residence, in consequence can direct eviction of the occupants, i.e., children/relative but not against minor children. An order of residence towards maintenance without passing the consequential order of eviction would render the power and authority of the Tribunal meaningless.*

*65. It follows that Tribunal has power to deal only with a particular kind of property (residence) sought for maintenance but lacks powers to adjudicate upon any other kind of property of the senior citizen. Such power is vested with the District Magistrate under Chapter V to protect any kind of property, movable or immovable, tangible or intangible against any person, i.e., children/relative or third party, but would not include the property sought by the senior citizen for residence towards maintenance from his children/relatives. Any other interpretation would be conferring power upon the District Magistrate to deal and adjudicate upon property sought by the senior citizen for provision of maintenance, merely for the reason that the power of eviction has to be read exclusively into the expression 'protection' of the property of senior citizen. Tribunal has a limited power while adjudicating the issue of property required only for the maintenance of the senior citizen.*

*66. Tribunal can be approached by senior citizen or parent, as the case may be, for maintenance. Whereas, senior citizen alone can approach the District Magistrate for protection of his life and property of any kind, other than the property (residence) involved in proceedings before the Tribunal."*

14. Thereafter, the co-ordinate bench recorded its conclusions. Conclusion number "iv" reads as below :-

" (iv) Chapter V is confined to protection of life and property of the senior citizen alone. Protection of property would also include eviction of the occupant from the tangible property. The power is

conferred on the District Magistrate. The occupant could be children / relatives or third party."

15. Thus, it has been submitted, insofar as the State of U.P. is concerned, there is no doubt as to existence of CAP. The same has never been declared unconstitutional. There is no challenge to the CAP in these proceedings. As to the power of the District Magistrate under Chapter V of the Act, there exists no doubt. A senior citizen may apply and the District Magistrate may provide for eviction simplicitor from an immovable property belonging to a senior citizen.

16. The ratio of the learned single judge decision in ***Krishna Kumar (supra)*** to the extent it runs contrary to the ratio in ***Shivani Verma (supra)*** remains per incuriam and does not declare binding law.

17. With respect to the decision of the Punjab and Haryana, High Court, in ***Simrat Randhawa (supra)*** a point of distinction has been drawn on the reasoning that in the present facts there is no challenge to the CAP and again in view of co-ordinate bench decision in ***Shivani Verma (supra)*** the ratio in ***Simrat Randhawa (supra)*** may remain of non persuasive value. Also, it has been pointed out that there exists an earlier decision of Punjab and ***Haryana, High Court in Harcharan Singh vs. Bhagat Singh and others 2019 (2) R.C.R. (Civil) 313***, wherein it was observed as below:-

*"The petitioner, herein, is residing in the house of respondent No.1 on the basis of concession given by his father in the property owned by him. He, as a licensee, is only permitted to enjoy the possession of the property licensed but without creating any interest in the property. A licence stands terminated the moment the licensor conveys a notice of termination of a licence. There is no vested right of any type to remain in possession of the property of respondent No.1. Admittedly, respondent No.1 is owner of the property, in dispute. Respondent no.1 is required to be protected as mandated by Section 22 of the Act read with Rule 23 of the Rules and para 1 of the Action Plan. There cannot be any effective protection of property of the senior citizens unless the District Magistrate has the power to put the senior citizen into possession of the property and/or to restrain or eject the person who interferes in the possession of the property of the senior citizen. The protection of the property of a senior citizen includes all incidences, rights and obligations in respect of property in question. Once a senior citizen makes a complaint to District Magistrate against his son to vacate the premises of which the son is a licensee, such summary procedure ensures for the benefit of the senior citizen. The petitioner has no right to resist his eviction only on the ground that he is the only son or he does not have any source of income. The eviction is one part of the right to protect 8 of 10 the property of a senior citizen and this right can be exercised by a senior citizen in terms of provisions of the statute, Rules framed and the Action Plan notified."*

18. As to the decision of the Supreme Court in **Smt. S.**

**Vanitha (surpa)**, it has been submitted that, that decision has no bearing to the present facts. In the first place the Supreme Court has not ruled or reasoned that no summary eviction may arise under the provisions of the Act and the Rules framed thereunder. Second, in the facts of that case, summary eviction ordered under the Act was set aside for reason of those proceedings being a device.

19. That point of distinction as supported by the reasoning of the co-ordinate bench of this Court in ***Shivani Verma (supra)*** has also been pressed against the applicability of ratio of the Patna High Court decision in ***Ravi Shankar (supra)***.

20. As to the third submission advanced by learned counsel for the petitioner, it has been submitted, in absence of any jurisdictional error on part of the statutory authority, it cannot be said that the proceedings thus initiated would abate or be placed in abeyance during the pendency of a civil suit instituted by one of the parties, whose eviction has been sought. If that were to be applied by way of principle in law, no proceeding for eviction may ever arise under the Act and Rules framed thereunder as the party at risk of eviction may only file a civil suit and defeat the entire object and purpose of the Act and the Rules framed thereunder.

21. Once the Parliament has recognized the vulnerability factor of the aged members of the society and has enacted the special welfare provisions to protect senior citizens from exploitation and abuse, occasioned by their vulnerability, accompanying feeble health and frugal means, there exists no room to accept the line of reasoning being canvassed by learned counsel for the petitioner.

22. Having heard leaned counsel for the parties and perused the record, in the first place we do not find any evidence or material to reach an exceptional finding that the proceedings instituted by 'F' are proxy proceedings instituted by him for the benefit of 'S1'. Merely because 'S1' may either be neutral to the dispute between 'F' and 'S2' and / or merely because 'S1' may be supporting 'F' in his dispute with 'S2', it may not lead to the conclusion as suggested by learned counsel for the petitioner.

23. No pleading made by 'F' and no process applied by 'F' is shown to be one instituted or performed by 'S1' for his benefit. To that extent the objection raised by the petitioner is found to be misconceived and unfounded, on facts and evidence.

24. As to the second objection, we may have been invited to offer a detailed discussion with respect to the submissions advanced by learned counsel for the parties. However, as noted above, the co-ordinate bench in ***Shivani Verma (supra)*** speaking through Suneet Kumar (J) has

made a detailed, lucid and nuanced discussion covering all aspects and facets of the submission presently advanced. The decision of the Supreme Court in ***Smt. S. Vanitha (supra)*** was also considered. Having quoted in extenso the reasoning offered by the co-ordinate bench, no useful or further purpose may be served in repeating the same. Suffice to record, we find ourselves in complete agreement with the reasoning of the co-ordinate bench. There being proceedings referable to Chapter V of the Act, the pre-condition of claim / or maintenance allowance does not exist. The application filed by 'F' before the District Magistrate was wholly maintainable.

25. At the same time, with respect to the decision in ***Smt. S. Vanitha (supra)***, we may add that the said decision arose in the context of facts that were entirely different. The applicable law and its effect was also found different. In the present case, no proceeding has been instituted under the Protection of Women From Domestic Violence Act, 2005, on the contrary here the senior citizen 'F' is seeking the eviction of both 'S2' and his wife. In ***Smt. S. Vanitha (supra)***, the senior citizen (mother-in-law), was seeking eviction of her daughter-in-law alone, the latter having suffered proceeding for dissolution of her marriage. Further, the property in issue (in that case) was originally purchased by the son of the senior citizen. He sold it to his father who in turn gifted it to his wife.

26. Then, the said daughter-in-law had also instituted proceedings seeking residence under the Protection of Women From Domestic Violence Act, 2005.Therefore, it was also her objection that the proceeding set up under the Act were by way of a device to defeat her just claim under that special Act.

27. Last, before the Supreme Court, the submissions as were advanced on behalf of the daughter-in-law were recorded in paragraph 9 in **Smt. S. Vanitha (supra)** as below :-

> *"9. The appellant, aggrieved by the judgement of the Division Bench of the High Court, has preferred the present special leave petition. Mr Yatish Mohan, learned Counsel appearing on behalf of the appellant submitted that:*
>
> *(i) The appellant is residing in her matrimonial home as the lawfully wedded spouse of the Fourth respondent and she cannot be evicted from her shared household, in view of the protection offered by Section 17 of the Protection of Women from Domestic Violence Act 2005.*
>
> *(ii) The proceeding under Section 3 and 4 of the Senior Citizens Act*

*2007 was filed by her mother-in-law and father-in-law in connivance with her estranged spouse to deprive her of her matrimonial home;*

*(iii) The finding of the Division Bench on the appellant"s current residential status was based on a fraudulent set up. The alleged postal cover was dispatched on 21 June 2018, during the pendency of the proceedings before the Single Judge, and merely indicated a postal endorsement ("no such person") as it arrived when nobody was present at home to receive it;*

*(iv) The decree for the dissolution of marriage which was passed against the appellant by the Trial Judge on 5 December 2013 has been set aside by the High Court on 14 January 2016 and the proceedings have been remanded back to the jurisdictional Family Court for a disposal afresh. Hence, as of date, the appellant continues to be in a lawful relationship of marriage with the Fourth respondent and she has no other place to live except the suit premises, with her minor daughter;*

*(v) The provisions of the Senior Citizens Act 2007 have been manipulated to defeat the rights of the appellant. The manner in which the premises were transferred by the spouse of the appellant to his father and the gift deed thereafter to mother-in-law of the appellant are indicative of an attempt to misuse the provisions of the Act, to defeat the claims of the appellant; and*

*(vi) In asserting her right under Section 17 of the PWDV Act 2005, the appellant relies on the decision of this Court in Satish Chander Ahuja vs. Sneha Ahuja (Civil Appeal No. 2483 of 2020, decided on 15 October 2020). In sum and substance, it has been urged that the authorities constituted under the Senior Citizens Act, 2007 had no jurisdiction to order the eviction of the appellant. Moreover, the proceedings have been utilised to secure the eviction of the appellant so as to deny her claim of a right to reside in the shared household under the PWDV Act 2005."*

28. Thus, no submission was advanced to the effect that authorities constituted under the Act and the Rules framed thereunder have no jurisdiction to seek eviction simplicitor under Chapter V of the Act. Though, that nature of submission may have existed earlier before the Karnataka High Court in the writ petition and the writ appeal, at the same

time, that submission was not advanced before the Supreme Court. Therefore, the same has not been considered by the Supreme Court. That is not part of the ratio of the decision of the Supreme Court.

29. In fact the Supreme Court observed in summation point 24(ii) and 24(iv) that the daughter-in-law (in that case) may not be evicted summarily during pendency of her proceedings under the Protection of Women From Domestic Violence Act, 2005. Thus, it appears to us the Supreme Court itself was cognizant that the summary eviction proceeding may otherwise arise and be concluded under the Act and the Rules framed thereunder. However, it reasoned that such proceeding may not be concluded and made final during the pendency of another proceedings under another special Act. To that extent, discussion exists in the decision of the Supreme Court itself that Protection of Women From Domestic Violence Act, 2005 and the protections thereunder are not to be trifled or ignored.

30. In view of that reason offered by us, we find ourselves in respectful disagreement with the decision of the Patna High Court in ***Ravi Shankar (supra)*** and the decision of the Punjab and Haryana High Court in ***Simrat Randhawa (supra).*** The decision of the learned single judge of this Court in ***Krishna Kumar (supra)*** is distinguishable, that being referable to proceedings under Chapter II of the Act and not Chapter V of the Act, as is the present case.

31. As to the third objection raised by learned counsel for the petitioner based on the decision of the Supreme Court in ***Sau Rajani (supra)***, we find the same has no application in the present case. While the jurisdiction of the Civil Courts may survive summary proceedings for eviction under Chapter V of the Act read with the Rules framed thereunder, read with the CAP, that summary proceeding may remain subject to the out come of any civil suit wherein larger issues and other rights may be involved.

32. At present, we make it clear that we are not proposing to rule as to the exact extent and nature of proceedings to which the summary eviction proceedings under Chapter V of the Act may remain subject to. However, solely to deal with the objections raised on the strength of plenary jurisdiction of the Civil Courts, we provide that the summary eviction under the Act would remain subject to final out come of O.S. No. 837 of 2020 (Dinesh Ahuja vs. Indrajeet Ahuja and another) pending in the Court of Civil Judge (Senior Division), Meerut. In those proceedings larger and other rights of the parties may be contested and decided. Any other construction made would defeat the entire object and purpose of the special welfare law, namely, the Act and the Rules framed thereunder.

33. Unfortunate as it may be, it is a hard reality of life that upon breaking down of joint families and perhaps as a direct result of smaller units of family, the aged are feeling isolated and at times abused. Whatever be the true reasons that may exist in particular families, the Act and the Rules offer a life preserving protective umbrella to all the aged members of the society, who may feel victimized or helpless at the hands of their children, or their relatives and others, both with respect to provision for maintenance allowance and with respect to protection of their properties. Once that protection has been granted, there is no reason to restrict its operation. Any margin

of restriction created by courts may be wholly counter productive to fulfillment of the legislative and societal needs as those standing under the umbrella of protection offered by the Act and the Rules framed thereunder are in their sunset years and do not have decades of time or abundance of energy and resources or the motivation or the conviction to contest legal proceeding- that too often with those who came into the world through them.

34. In view of the above, we find no merit in the submissions advanced by learned counsel for the petitioner. In absence of any other submissions, the writ petition fails and is **dismissed.**

35. No order as to costs.

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**(2024) 11 ILRA 359**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 11.11.2024**

**BEFORE**

**THE HON'BLE ANJANI KUMAR MISHRA, J.**
**THE HON'BLE JAYANT BANERJI, J.**

Writ -C No. 34710 of 2022

**Gram Panchayat & Anr. ...Petitioners**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioners:**
Anoop Kumar Mishra, Sr. Adv.

**Counsel for the Respondents:**
C.S.C.

**A. Local Body Law – Constitution of India,1950 - Article – 243-Q – UP Municipalities Act, 1916 – Sections 3(2) & 4 – Inclusion of Gram Panchayat in the transitional area of Nagar Panchayat – Non-consideration of the petitioner's objection – Effect – Held, the object of S. 4 is to provide opportunity to the general public to file objections against the proposal. The objection could be on various aspects, which is an invaluable right conferred in the general public, with avowed object of strengthening their hands in all facets of local self-governance – High Court quashed the impugned notification. (Para 15 and 20)**

**Writ petition allowed.** (E-1)

**List of Cases cited:**

1. Surjit & ors. Vs St. of U.P. & ors.; 2022 (11) ADJ 111 (DB)

2. St. of U.P. & ors. Vs Pradhan Sangh Kshetra Samiti & ors.; (1995) Supp2 SCC 305

3. Narendra Singh Rana Vs St. of Uttarakhand & ors.; AIR 2017 Uttarakhand 3

4. Nagar Palika Parishad & ors. Vs St. of U.P. & ors.; 2010 (3) ADJ 703 (DB)

5. Baldev Singh & ors. Vs St. of H.P. & ors.; (1987) 2 SCC 510

6. St. of Orissa Vs Sridhar Kumar Mallik; AIR 1985 SC 1411

(Delivered by Hon'ble Jayant Banerji, J.)

1. This writ petition has been filed challenging the notification no.3130/9-1-2022-88T.A./22 Lucknow dated 13.10.2022 issued by the State Government in exercise of powers under clause (2) of Article 243-Q of the Constitution of India read with sub-section (2) of Section 3 of the Uttar Pradesh Municipalities Act, 1916[1] including the areas specified in the Schedule appended to the notification in the transitional area of Nagar Panchayat Barsana in District Mathura for purpose mentioned in Part IX-A of the Constitution. The petitioners are aggrieved by this notification insofar as it relates to inclusion of Gram Panchayat Barsana Dehat in the aforesaid transitional area of Nagar Panchayat Barsana.

Also under challenge is an order dated 20.9.2022 passed by the District Panchayat Raj Officer, Mathura pursuant to the notification dated 15.9.2022 issued by the State Government, which is a draft notification published for information to all concerned and with a view to invite objections and suggestions as required under sub-section (1) of Section 4 of the Act, 1916 whereby it has been directed that in respect of the works that have been executed with regard to the village corpus accounts pertaining to Gram Panchayat, payments of the same would be done on priority basis. It was further directed that no further amount would be credited to the corpus account of the Gram Panchayats and if any works are executed by the Gram Panchayat in anticipation of funds, they would be responsible for the same.

2. The facts as appearing from the record of the writ petition are that the petitioner no.2 was elected as Pradhan of Gram Panchayat Barsana Dehat, Vikas Khand-Nand Gaon, Tehsil-Goverdhan, District Mathura for the term of 2021-2026 with the present term of the petitioner being slated to be continued till 1.2.2026; that ten work orders were issued by the Gram Panchayat and approximately 40% of the works have been completed; that 80% of the population of the Gram Panchayat is extremely poor and jobless and most of the persons are dependent upon the facilities provided by the State Government in scheme such as MNREGA, Khadi Gramodhyog etc.; that the petitioner-Gram Panchayat, is famous for its various religious and historical places; that a notification no.2775/9-1-2022-88 T.A./22 Lucknow dated 15.9.2022 was issued by the Governor in exercise of powers under clause (2) of Article 243-Q of the Constitution read with sub-section (2) of Section 3 of the Act, 1916 proposing to include several areas including the areas of Gram Panchayat Barsana Dehat in the transitional area of Nagar Panchayat Barsana with a view to invite objections and suggestions in respect thereof as required under sub-section (1) of Section 4 of the Act, 1916. This notification provided that objections or suggestions, if any, with respect to the proposed notification should be sent in writing addressed to the Pramukh Sachiv, U.P. Shasan, Nagar Vikas, Anubhag-I, Bapu Bhawan, Lucknow. It was specified that only such objections and suggestions shall be taken into consideration as are received within seven days from the date of publication of that notification in the Gazette. Admittedly, this notification was published in the Gazette on 15.9.2022. The area of Barsana Dehat is also included in the Schedule to the notification. An objection dated 19.9.2024 was sent by the petitioner no.2, inter alia, to the Pramukh Sachiv by recorded delivery of India Post bearing Consignment No.EU 910597843IN. It is stated with proof that the item was delivered on 20.9.2022 (as per tracking report). It is stated that the objection filed by the petitioners has not been considered prior to issuing the notification dated 30.10.2022 under sub-section (2) of Section 3 of the Act, 1916 and the area of Barsana Dehat has been included in the transitional area of Nagar Panchayat Barsana.

3. The contention of the learned counsel for the petitioners is two fold. **Firstly**, it is contended that as per the mandate of Section 4 of the Act, 1916, since the objection of the petitioners having been demonstrated to have been received by the addressee at its office within the time specified in the notification aforesaid dated 15.9.2022, the respondents were

bound to consider the same and that having not been done, the notification dated 13.10.2022 under sub-section (2) of Section 3 of the Act, 1916 is liable to set aside insofar as inclusion of the area of Barsana Dehat in the transitional area of Nagar Panchayat Barsana is concerned. **Secondly**, it is stated that 80% families in village Gram Panchayat Barsana Dehat are poor and belong to the labourer class, who are availing benefit of the scheme in MNREGA for purposes of their livelihood and inclusion of the area of Barsana Dehat in Nagar Panchayat Barsana would be violative of the criteria prescribed in the Government Order dated 10.11.2014 that has been enclosed as Annexure-10 to the writ petition. Learned counsel for the petitioners in support of his contentions has relied upon a judgment of this Court in the case of **Surjit & 5 Ors. vs. State of U.P. & 2 Ors.**[2] and the judgment of the Supreme Court in the case of **State of U.P. & Ors. vs. Pradhan Sangh Kshetra Samiti & Ors.**[3].

4. In the counter affidavit filed on behalf of the respondent nos.1 and 2, it has been stated that the notification under Section 4(1) of the Act, 1916 was issued on 15.9.2022 providing opportunity of filing objections within seven days and the said notification was published in two daily newspapers of 18.9.2022. The objections/suggestions that were received within the time provided in the notification dated 15.9.2022 were decided on 26.9.2022 by the State Government. It has further been stated that as per record, the petitioners' objection dated 19.9.2022 was not received within the time provided under the notification dated 15.9.2022 and, therefore, there was no occasion to consider the objection of the petitioners; that a total of 14 objections were received till 23.9.2022, which was decided by the State Government on 26.9.2022; that the State Government through Government Orders dated 31.1.2015 and 23.11.2020 prescribed the standards / criteria for inclusion of any area in transitional area of a Nagar Panchayat as per the Act, 1916. The copies of the Government Orders have been enclosed along with the counter affidavit.

5. It is pertinent to mention here that the statement of the petitioners that objection was filed on 19.9.2022 and the copy of the same had been forwarded/sent to the respondent no.1 by way of registered post as well as by email, which was received by the office of the respondents on 20.9.2022, has not been specifically denied. A copy of the objections dated 19.9.2022 alongwith proof of despatch by recorded delivery as well as the tracking report have been enclosed as Annexure-6 to the writ petition.

6. It has been urged by learned Additional Advocate General appearing for the State of U.P. that a total of 14 objections were received by the State Government which had been duly decided by means of the orders passed on 26.9.2022 and duly recorded in an office memorandum of 26.9.2022 filed alongwith the counter affidavit. The contention is that no opportunity of hearing was required to be given to the petitioners and, moreover, the objections raised by the petitioners in the letter dated 19.9.2022 are substantially the same as raised by other 14 objectors whose objections were duly considered and decided on 26.9.2022. It is stated that no useful purpose would be served in considering the objections of the petitioners dated 19.9.2022 separately as the same stood addressed while disposing of the aforestated 14 objections on 26.9.2022. In

support of his contention, learned Additional Advocate General has relied upon the judgment of the Uttarakhand High Court in **Narendra Singh Rana vs. State of Uttarakhand & Ors.**[4] and a judgment of a Division Bench of this Court in **Nagar Palika Parishad & Ors. vs. State of U.P. & Ors.**[5].

7. Sections 4, 3 and 5 of the Act, 1916 read as follows:-

> "**4. Preliminary procedure to issue notification**. - (1) Before the issue of a notification referred to in Section 3, the Governor shall publish in the Official Gazette and in a paper approved by it for purposes of publication of public notices, published in the district or, if there is no such paper in the district, in the division in which the local area covered by the notification is situate and cause to be affixed at the office of the District Magistrate and at one or more conspicuous places within or adjacent to the local area concerned a draft in Hindi or the proposed notification along with a notice stating that the draft will be taken into consideration on the expiry of the period as may be stated in the notice.
>
> (2) The Governor shall, before issuing the notification consider any objection or suggestion in writing which it receives from any person, in respect of the draft within the period stated.
>
> 3. **Declaration etc. of transitional area and smaller urban area**. -(1) Any area specified by the Governor in a notification under clause (2) of Article 243-Q of the Constitution with such limits as are specified therein to be a transitional area or a smaller urban area, as the case may be.
>
> (2) The Governor may, by a subsequent notification under clause (2) of Article 243-Q of the Constitution, include or exclude any area in or from a transitional area or a smaller urban area referred to in sub-section (1), as the case may be.
>
> (3) The notifications referred to in sub-sections (1) and (2) shall be subject to the condition of the notification being issued after the previous publication required by Section 4 and notwithstanding anything in this section, no area which is, or is part of, a cantonment shall be declared to be a transitional area or a smaller urban area or be included therein under this section.
>
> 5. **Effect of including area in transitional area or smaller urban area**. - Where by a notification referred to in sub-section (2) of Section 3 the Governor includes any area in a transitional area or smaller urban area, such area shall thereby become subject to all notifications, rules, regulations, bye-laws, orders, directions, issued or made under this or any other enactment and in force throughout the transitional area or smaller urban area, at the time immediately preceding the inclusion of the area."

8. A perusal of sub-section (1) of Section 4 of the Act, 1916 reflects that it

mandates that before the issue of a notification referred to in Section 3, the Governor shall publish in the Official Gazette and in a paper, approved by it for purposes of publication of public notices, published in the district or, if there is no such paper in the district, in the division in which the local area covered by the notification is situate and cause to be affixed at the office of the District Magistrate and at one or more conspicuous places within or adjacent to the local area concerned, a draft in Hindi of the proposed notification alongwith a notice stating that the draft will be taken into consideration on the expiry of the period as may be stated in the notice. Sub-section (2) of Section 4 mandates the Governor to consider any objection or suggestion in writing which it receives from any person in respect of the draft before issuing the notification under Section 3.

Therefore, the draft notification in Hindi is mandated to be published: (i) in the Official Gazette; (ii) in a paper approved by the Governor for purposes of publication of public notices published in the district; (iii) or, if there is no such paper in the district, in the division in which the local area covered by the notification is situate; (iv) cause to be affixed at the office of the District Magistrate; and (v) at one or more conspicuous places within or adjacent to the local area concerned specifying that draft will be taken into consideration on the expiry of the period as may be stated in the notice. It is evident that the legislation mandates wide, effective and mandatory notice so that the persons living within the area or areas covered by the draft notification have adequate opportunity of accessing information about the proposed transition of those areas as contemplated under Article 243-Q of the Constitution. Sub-section (2) of Section 4 gives a democratic right to every person living in the area sought to be be covered by the notification to submit any objection or suggestion in writing in respect of the draft within the period stated therein.

9. Sub-section (3) of Section 3 of the Act, 1916 provides that the notification referred to in sub-sections (1) and (2) of Section 3 shall be subject to the condition of the notification being issued after the previous publication required by Section 4. As such, the essential requirement of compliance of Section 4 has been highlighted by this provision of Section 3 of the Act, 1916.

10. Section 5 of the Act, 1916 provides the consequence of a notification referred to in sub-section (2) of Section 3 made by the Governor mandating such area to become subject to all notifications, rules, regulations, bye-laws, orders, directions, issued or made under the Act, 1916 or any enactment and in force throughout the transitional area or the smaller urban area at the time immediately preceding the inclusion of the area.

11. Thus, the notification under Section 3 visits the persons living in the area notified with several civil consequences that may include taxation on properties, deprivation of benefits from government programs and schemes for village areas, etc. Under such

circumstances, which may bring about drastic changes in the various aspects of lives of persons, the opportunity of making objections and /or suggestions after publication of draft notification and due consideration of the same by the Governor, are vital and mandatory requirements of the statute. It is true that there is no issue regarding deprivation of property of the petitioners, however, it is a matter of consideration that collective benefits that accrue to people living in the gram panchayat area prior to such notification are sought to be taken away in the name of perceived benefits of such area being included in the Nagar Panchayat. Therefore, each person resident of such area which is subject to such notification, is a stakeholder and is conferred a right by the Act, 1916 to make suggestions and objections as the case may be. Such suggestions and objections, when duly filed, have to be accorded due consideration by the Governor, and the State Government cannot brush aside an objection by means of a general denial on the ground that it was not received within the time provided in the draft notification where it has been demonstrated by the petitioner that the objection was duly dispatched and the delivery report of the postal department reflects its delivery to the addressee.

12. Now to consider the contention on behalf of the respondents that the objections of the petitioner are the same as those raised by other 14 objectors which were duly considered, a bare perusal of the objections filed by the petitioner reflects otherwise.

13. Annexure 6 to the writ petition is the letter sent by the petitioners, which is dated 19.9.2022. This letter reads as under:-

"सेवा में,

दिनांकः 19.09.2022

श्रीमान प्रमुख सचिव

उत्तर प्रदेश शासन नगर विकास अनुभाग

बापू भवन लखनऊ

विषय- ग्राम पंचायत बरसाना देहात को नगर पंचायत बरसाना के विस्तार के संबंध में उत्तर प्रदेश सरकार द्वारा दिनांक 15/17/9/2022 संख्या 2775/9-1-22-88 टी०ए-/22 के संबंध में आपत्ति

महोदय,

आपको अवगत कराना है कि ग्राम पंचायत बरसाना देहात में 80% परिवार गरीब एंव मजदूर हैं जो कि "MGNREGA" के तहत मजदूरी करके ही अपना जीवन यापन करते है। यदि उसे नगर पंचायत बरसाना में सम्मिलित किया तो बहुत परिवारों का रोजगार बंद हो जाएगा और बेरोजगारी उत्पन्न हो जाएगी। एंव माननीय मुख्यमंत्री जी द्वारा सृजित योजनाएं जैसे कि खादी ग्राम उद्योग, महिला सशक्तिकरण के लिए NRLM एंव अन्य सरकारी योजनाओं से ग्रामीण वंचित हो जाएंगे। नगर पंचायत बरसाना का यदि सीमा विस्तार होता है तो गरीब व्यक्ति पर घर कर, जल कर एंव बिजली कर अतिरिक्त वसूल किया जाएगा। जिससे मजदूर वर्ग के लोगों पर अतिरिक्त बोझ बढ़ जाएगा और उनको जीवन यापन करने में कठिनाइयों का सामना करना पड़ेगा। जिन ग्राम पंचायतों को सीमा विस्तार में बढ़ाया गया है उनमें पिछले वर्ष 2021 में त्रिस्तरीय पंचायत चुनाव हुए हैं जिससे ग्राम प्रधान एंव सदस्य निर्वाचित हुए है संविधान के अनुसार एक जनता द्वारा चुने हुए प्रतिनिधि को हटाना गलत होगा। मथुरा जिले की जिन ग्राम पंचायतों का सीमा विस्तार हुआ है वहां पर 2021 में कोई भी चुनाव नहीं कराया गया है जैसे गोवर्धन में जतीपुरा एंव आन्यौर एंव राधा कुंड में राधा कुंड देहात। ग्राम पंचायतों में विकास कार्य ग्राम प्रधानों द्वारा शासन के आदेश अनुसार किया जा रहा है एंव गरीब जनता की भलाई हेतु कई कार्य युद्ध स्तर पर चल रहे हैं। उन पर बहुत प्रभाव पड़ेगा अथवा जिसका सीधा असर गरीब जनता पर होगा। अतः बरसाना नगर पंचायत के विस्तार में ग्राम पंचायत बरसाना देहात के मजदूर वर्ग, ग्राम प्रधान एंव ग्राम पंचायत के सदस्यगण को आपत्ति है।

अतः महोदय से निवेदन है कि ग्राम पंचायत बरसाना देहात की जनता के हित में जनता द्वारा चुने हुए

प्रधान के द्वारा कराए जा रहे कार्यो को उनके कार्यकाल पूरा होने तक ग्राम पंचायत बरसाना देहात को नगर पंचायत बरसाना के विस्तार की कार्यवाही रोक दी जाए और ग्राम पंचायत बरसाना देहात को ग्राम पंचायत ही रहने दिया जाए।

सधन्यवाद

प्रार्थी

बीना देवी(ग्राम प्रधान), ग्राम पंचायत

सदस्य एंव ग्रामवासी

ग्राम पंचायत बरसाना देहात

विकासखंड नंदगाव/तहसील-गोरवर्धन

जिला-मथुरा "

14. The aforesaid letter reflects that apart from the objection that 80% of the families are poor and belonged to the labour class, who are carrying on the livelihood by working as labour under the MNREGA Scheme, and that many of the families would lose their livelihood and will become unemployed, it has also been stated that various Schemes initiated by the Chief Minister relating to Khadi Gramodhyog, Women Empowerment and other Government Schemes would not be available; that many development schemes are being got done by the Gram Panchayat on a war footing for the benefit of poor public which would be directly affecting the poor public; that Panchayat elections at three levels were held in the previous year 2021, in which the Gram Pradhan and members had been elected, and, therefore, it would be wrong to remove the elected representatives in view of the Constitution of India. It is pertinent to note that the aforesaid letter has also been signed by about 40 other persons. Annexure-3 to the counter affidavit contains the decisions of the Government taken on the objections received from 14 other persons in the concerned Gram Panchayat. Perusal of those objections reflects that though certain issues are common, however, other objections that have been raised in the objections filed by the petitioners do not find mention in the objections considered and disposed of by the Government. The objections appearing in Annexure CA-3 to the counter affidavit are collated and are as follows:-

"(i) चरित्र प्रमाण पत्र, जाति प्रमाण पत्र, निवास प्रमाण पत्र, आय प्रमाण पत्र, विधवा पेंषन, वृद्धावस्था पेंषन, मृत्यु प्रमाण पत्र आदि

बनवाने में समस्या

(ii) मनरेगा योजना के अन्तर्गत 300 से अधिक श्रमिक बेरोजगार हो जायेंगे

(iii) अष्टसखियों के गाँव का अस्तित्व समाप्त हो जायेगा

(iv) नगर पालिका में गॉव सम्मिलित होने के कारण बिजली यूनिट का रेट बढ जायेगा एवं गृहकर, जलकर टैक्स भी लागू हो जायेंगे

(v) नगर पालिका बनने से तहसील का परिवर्तन हो जायेगा"

15. In the case of **Sujit Kumar (supra)** relied upon by learned counsel for the petitioners, this Court observed that the object of Section 4 is to provide opportunity to the general public to file objections against the proposal. The objection could be on various aspects, which is an invaluable right conferred in the general public, with avowed object of strengthening their hands in all facets of local self governance.

16. The judgments relied upon on behalf of the respondents are of no assistance to the respondents.

In the judgment in the case of **Narendra Singh Rana** (supra), other connected writ petitions were also decided. The case of the petitioner in one petition was that there was no warrant for notifying

the Panchayat in question as a Nagar Panchayat. Primarily, reliance was placed on a Government Order of 1986 that specified various conditions for declaring a Nagar Panchayat. In another connected writ petition, the case of the Government was that no objections were received within time and, therefore, the contention was that without considering any of the objections, the area had been notified as Nagar Panchayat. The Court observed in paragraph 14 thereof that for constituting an area into a Nagar Panchayat, the Government is obliged to follow the procedure laid down in Section 4 of the Municipalities Act. Objections are to be invited and the objections which are received within the time are to be considered. On the contention raised by one of the counsel for the petitioner therein that the petitioner was not given an opportunity of being heard, the Court observed that if the objections which are filed in time are considered and the decision is taken, then it may not be open to challenge on the ground that the person was not given a personal hearing. The Court observed as follows:-

> "24. Principles of natural justice are the contribution of the courts towards the cause of justice. Principles of natural justice are observed in various contexts and in various ways. In some situations, the right to represent against a proposed action would suffice. In other cases, it may be necessary to give a right of personal hearing. Even a right of personal hearing may be afforded to a person unaided by service of a legal practitioner in some situations; but, there may be situations, which may demand that a person be assisted by a qualified practitioner of law which alone would satisfy the requirements of justice. Therefore, it would all depend on the context, the object, the implications involved in the practicality of complying with the various aspects of natural justice and far more importantly, the actual provisions of the governing statute."

17. In the aforesaid case of **Narendra Singh Rana**, the petitioner therein placed reliance on the decision of the Supreme Court in the case of **Baldev Singh & Ors. vs. State of Himachal Pradesh & Ors.**[6], wherein the Supreme Court had considered the case of **State of Orissa vs. Sridhar Kumar Mallik**[7] and it was noted that the Orissa Act provides in clear terms a right of hearing, whereas Section 256 of the Himachal Pradesh makes no such provision but the settled position in law is that where exercise of a power results in civil consequences to the citizens unless the statute specifically rules out the application of natural justice, the rules of natural justice would apply. Under the facts and circumstances, the Court in **Narendra Singh Rana** observed that it would not be proper to invalidate the notification under the Act in question on the ground that the petitioner was not given an opportunity of hearing. It is pertinent to mention here that in that case the objections of the petitioner were considered. However, the Court was of the opinion that matters being raised in the petition that seek a merit review cannot be a valid ground to maintain the writ petition. There was, however, one aspect in the case of **Narendra Singh Rana** that troubled the Court which appears in paragraph 40 of the judgment and reads as follows.

> "40. There is one aspect, which we must, however, indicate, which troubles us. In these cases, we notice that seven days' time

alone was granted for the filing of the objections and suggestions when publication was made under Section 4. It is not as if the matter is so urgent that such a short notice is to be given. Though the petitioners have not raised any complaint as such against the short period, and we need not actually pronounce on this; but, we certainly think that in future, Government must apply its mind to it and give reasonable time to persons concerned to raise objections for proposal and also apply its mind to the matter."

18. In the cited case of **Nagar Palika Parishad**, one of the challenges made to the notification was that the extension of the area of Nagar Palika Parishad was hurriedly taken without issuing and publishing the primary notification as provided under Section 4(1) of the Act, 1916. The Court found the challenge on this aspect to be baseless inasmuch as a draft notification under Section 4 of the Act, 1916 was published in the official Gazette and objections were invited. Certain objections/suggestions were received which included a representation of the petitioner. All the representations were considered and it was found by the Court that the other representations that were duly decided in detail with reasons, were on the same line as that of the petitioner's representation and, therefore, the contention that the objections of the petitioner were not decided with reasons, was found to have no force.

19. However, in the instant case, the facts are different. The objections of the petitioners were never considered. Under the circumstances, the notification and the order impugned in the writ petition cannot be sustained so far as they relate to Village Barsana Dehat.

20. The writ petition is, accordingly, **allowed** and the impugned notification dated 13.10.2022, insofar as it relates to Village-Barsana Dehat, Vikas Khand-Nand Gaon, Tehsil-Goverdhan, District Mathura, is quashed and the order dated 20.9.2022 passed by the respondent no.5, insofar as it relates to Village-Barsana Dehat is quashed.

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**(2024) 11 ILRA 367**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 22.11.2024**

**BEFORE**

**THE HON'BLE IRSHAD ALI, J.**

Writ -C No. 1000081 of 1994

**Smt. Sushma Srivastava ...Petitioner**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Avadhesh Kumar

**Counsel for the Respondents:**
C.S.C.

**A. Revenue Law – UP Zamindari Abolition & Land Reform Act, 1950 – Section 198(4) – Cancellation of patta – Land is a pond – Lessee is not the landless agricultural labour and her husband is in government job of Sub Divisional Officer in Tube Well Department – Effect – Held, allotment of lease is to be granted in favour of persons, who comes under the category defined under the Act. The petitioner does not come under the ambit nor is a landless agriculturist – No illegality has been committed in passing the impugned orders. (Para 13)**

**Writ petition dismissed.** (E-1)

(Delivered by Hon'ble Irshad Ali, J.)

1. Heard Sri Avadhesh Kumar, learned counsel for the petitioner and learned Additional CSC for respondent - State.

2. The present dispute pertains to plot Nos.22/23 and 276M/1.25 situated in village Mohammadpur Dina, Pargana and Tehsil Mohammadi, District Kheri. The patta in respect of disputed land was granted to the petitioner in pursuance of a resolution made by land management committee on 22.04.1987, which was later on approved by the Addl. Sub Divisional Officer on 12.07.1987. On the basis of tehsil report, the proceedings under Section 198(4) UPZA and LR Act for cancellation of patta granted in favour of the petitioner in respect of the disputed land were started on the ground that her husband was having much land and he was on the post of Assistant Engineer. Further the petitioner was not found in the category of land less agricultural labour.

3. On the basis of said report of tehsil, a case was registered and a notice was served on the petitioner in which the petitioner filed her objection on the ground that she was the permanent resident of the said gaon sabha and she was a land less agricultural labour.  In support of her case, the petitioner produced herself and two witnesses - Misri Lal and Pyara Lal. It is submitted that on behalf of the State, only one witness i.e. Ram Gopal, Lekhpal was produced. The petitioner also filed the extract of Khatauni as well as Khasra showing the name of the petitioner over the said disputed land.

4. By perusal of khasra and khatauni filed by the petitioner, it is clear that the disputed land i.e. plot Nos.276 & 22 are recorded as talab and the petitioner had taken the training of fisheries. It is stated that the patta in favour of the petitioner was for fisheries purpose and therefore the cancellation of patta by the Collector, Kheri under Section 198 (4) UPZA and LR Act is without jurisdiction.

5. Vide order dated 13.08.1990, the Collector, Kheri has cancelled the patta granted in favour of the petitioner only on the ground that the petitioner is not the land less agricultural labour and husband of the petitioner is doing government service and as such, she is not competent to get patta. Against the order of the Collector, the petitioner filed a revision before the Addl. Commissioner (Judicial), Lucknow Division, Lucknow, who dismissed the revision on 27.10.1993. Against the said order dated 27.10.1993, the petitioner filed a review petition before the Addl. Commissioner (Judicial) Lucknow Division, Lucknow, who dismissed the review petition on 14.12.1993 on the ground that no new argument could be brought on her behalf as made earlier at the time of passing the order dated 27.10.1993.

6. Being aggrieved by orders dated 13.08.1990 passed by the Collector, orders dated 27.10.1993 and 14.12.1993 passed by the Additional Commissioner, Lucknow Division, Lucknow, the present writ petition has been filed before this Court.

7. Submission of learned counsel for the petitioner is that the courts below have committed error in cancelling the patta of the petitioner on imagination, conjecture and surmises. In fact, the record has wrongly interpreted and wrong

conclusion was made that the petitioner was not a competent person to get the patta granted in her favour.

8. He next submitted that the courts below have acted without jurisidiction in cancelling the patta of the petitioner under Section 198 (4) UPZA and LR Act, while the said patta was granted in favour of the petitioner for fisheries rights.

9. On the other hand, learned Additional CSC for respondent State on the basis of counter affidavit stated that on the basis of resolution passed by the land management committee, gata No.22/0.23 acre and 276 min./1.25 acre total 2 kita/1.48 land was allotted in faovur of the petitioner and both these gatas pertain to the pond, therefore, a report for cancelling the patta was sent to the Court of District Magistrate, Kheri under Section 198(4) UPZA and LR Act. The District Magistrate, after hearing all the parties, cancelled the allotment of patta vide order dated 13.08.1990.

10. Against the order dated 13.08.1990, the petitioner preferred a revision before the Additional Commissioner under Section 333 of UPZA and LR Act, which was dismissed vide judgment and order dated 27.10.1993. Against the said order, the petitioner filed a review application, which was also rejected vide order dated 14.12.1993 being devoid of merits.

11. He lastly submitted that there is no illegality and infirmity in the impugned orders and the same are just and valid. The writ petition being misconceived, is liable to be dismissed by this Hon'ble Court.

12. I have considered the submissions advanced by learned counsel for the parties and perused the material on record.

13. On perusal of record, it is transpired that the petitioner is not an agriculturist labour nor has been allotted land in the shape of pond for fisheries rights. In fact, the land is a pond and allotment of lease is to be granted in favour of persons, who comes under the category defined under the Act. The petitioner does not come under the ambit nor is a landless agriculturist. In fact, 3.42 hectare land has been allotted in the name of petitioner's husband Sri Awadhesh Kumar, who is posted as Sub Divisional Officer in Tube Well Department, therefore, lease cannot be granted in his favour, therefore, no illegality has been committed in passing the impugned orders.

14. In view of above, the writ petition lacks merit and is hereby dismissed.

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**(2024) 11 ILRA 369**
**ORIGINAL JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 26.11.2024**

**BEFORE**

**THE HON'BLE SIDDHARTHA VARMA, J.**
**THE HON'BLE VINOD DIWAKAR, J.**

Application U/S 482 No. 8635 of 2023
With other connected cases

**Abhishek Awasthi @ Bholu Awasthi ...Applicant**

**Versus**

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

**Counsel for the Applicant:**
Jayant Kumar

**Counsel for the Opposite Parties:**

G.A.

**Criminal law- reference to larger bench- Criminal Procedure Code, 1973 — Section 482 — Inherent jurisdiction of High Court — Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 — Section 14-A — Scope of bar — Whether application under Section 482 CrPC maintainable in presence of appeal under Section 14-A of SC/ST Act- SC/ST Act, 1989 — Section 14-A — Nature of remedy — Bar on recourse to inherent jurisdiction — Distinction between "not maintainable" and "not liable to be entertained"- Jurisdiction under Section 482 CrPC is not absolutely ousted by Section 14-A of the SC/ST Act- Inherent Powers — Exercise in cases of private/civil dispute disguised as criminal case under SC/ST Act — Abuse of process — offence appears civil in nature and unconnected to caste identity, or is instituted with mala fide intent, the High Court can intervene under Section 482 CrPC-reference answered accordingly. (Paras 3, 33, 35 and 36)**

**HELD:**

Confronted by these two judgments, a learned Judge of our Court, on 20.9.2023, referred the matter to a Larger Bench after framing the following questions:

"1. The first Question involved in this batch of Applications under Section 482 of the Code of Criminal Procedure, 1973 (for short, 'the Code') is whether a challenge laid to the entire proceedings of a case under the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (for short, 'the SC/ ST Act') with no challenge to any interlocutory order i.e. a summoning order, would be within the mischief of the rule laid down in answer to Question No. (II) by the Full Bench in Ghulam Rasool Khan v. St. of U.P. & ors., 2022 (8) ADJ 691 (FB) (LB).

2. The allied and second Question involved is whether a challenge to a proceeding under the SC/ ST Act can be laid before this Court through an Application under Section 482 of the Code, in view of the principle in the Full Bench in Ghulam Rasool Khan (supra), where along with proceedings, the order taking cognizance and summoning the applicant is also challenged.

3. The third and a corollary to the aforesaid questions is: Whether there is a conflict of opinion between the learned Single Judge of this Court in Sushil Kumar Singh v. St. of U.P. & anr., (2023) 123 ACC 544 and Devendra Yadav & ors.v. St. of U.P. & anr., 2023 (5) ADJ 452, necessitating reference to a larger bench."

Thus, what needs to be understood is that there has to be a distinction between a proceeding being "not maintainable" and "not liable to be entertained". "Not being maintainable" would mean that the proceedings would not lie at all, whereas "not liable to be entertained" would mean that the application, though it would lie, shall not be entertained in the given facts of the case. The distinction may seems to be fine, and at times, it gets blurred, but nevertheless, it does exist and has to be compulsorily kept in mind. Whether an application involving the inherent jurisdiction of the High Court is to be entertained or not is a question to be considered and answered case to a case basis in the given facts- and circumstances of the case, and no general proposition or straight jacket formula could be laid down. The guiding principle is whether, in the given case, the continuance of proceedings would amount to abuse of the process of the Court and/ or whether interference of the High Court is necessary to secure ends of justice. (Para 33)

The first Question is thus answered by holding that there can be no hard and fast rule regarding the interference of the High Court under its inherent jurisdiction. The High Court can if it finds that by interfering in a particular case, it can prevent the misuse or abuse of the Court or law, then it may always so interfere. (Para 35)

We also would like to observe that Question No.III by the Full Bench in Ghulam Rasool Khan (supra) did not answer the aforesaid question. Therefore, we answer accordingly; when a challenge lies to the entire proceeding of a case registered under the SC/ST Act, the High Court could entertain the case under its inherent jurisdiction to secure the end of justice. High Courts are not merely Courts of law but also

Courts of Justice, and as such, they possess inherent powers to remove injustice. (Para 36)

As far as the answers to Questions nos.2 and 3 are concerned, we would like to mention that, as has been held by the Supreme Court in Gulam Mustafa (supra) decided on 10.5.2023; the High Court can also look into the correctness and validity of the summoning order, etc., when it takes cognizance of the entire proceeding under Section 482 Cr.P.C. However, when the proceedings are not under challenge under Section 482 Cr.P.C., the only course open to an accused/applicant is to file an appeal under Section 14-A of the SC/ST Act. (Para 37)

**Reference answered accordingly.** (E-14)

**List of Cases cited:**

1. Ramawatar Vs St. of M.P. reported in (2022) 13 SCC 635

2. Hitesh Verma Vs St. of Uttarakhand & anr. reported in AIR 2020 SC 5584

3. Arnit Das Vs St. of Bihar reported in 2000 (5) SCC 488

4. In Re: Provisions of Section 14-A of the SC/ST (Prevention of Atrocities) Amendment Act, 2015 (CRIMINAL WRIT - PUBLIC INTEREST LITIGATION No.8 of 2018) decided on 10.10.2018

5. Ghulam Rasool Khan & ors. Vs St. of U.P. & ors. reported in AIR Online 2022 All 68 (FB)

6. Application U/S 482 Cr.P.C. No.11043 of 2023 (Devendra Yadav & ors. Vs St. of U.P. & anr.)

7. B.Venkateswaran & ors.Vs P. Bakthavatchalm reported in AIR 2023 SC 262

8. Ram Gopal Vs St. of M.P. reported in AIR Online 2021 SC 807

9. Gulam Mustafa Vs St. of Karn. reported in AIR 2023 SC (Criminal) 966

10. Prabhu Chawla Vs St. of Raj. & anr. reported in (2016) 16 SCC 30

11. Madhu Limaye Vs St. of Mah. reported in (1977) 4 SCC 551

12. Punjab St. Warehousing Corporation, Faridkot v. Shree Durga Ji Traders & ors.reported in (2011) 14 SCC 615

13. Satya Narayan Sharma Vs St. of Raj. reported in (2001) 8 SCC 607

14. Asian Resurfacing of Road Agency Private Ltd. & anr. Vs CBI reported in (2018) 16 SCC 299

15. Mohd. Hafiz Vs St. & ors. reported in 1977 (14) ACC 288

16. St. of Haryana & ors. Vs Bhajan Lal & ors.reported in 1992 Supp. (1) SCC 335

17. R.P. Kapur Vs St. of Pun. AIR 1960 SC 866

18. Anuj Kumar @ Sanjay & ors. Vs St. of U.P. & ors. passed by this Court in Application u/s 482 No.2763 of 2022

19. U.O.I. & ors. Vs G.M. Kokil & ors., (AIR 1984 SC 1022)

20. Smt. Usha Vs St. of U.P. & anr.(Criminal Appeal No.10230 of 2023)

(Delivered by Hon'ble Siddhartha Varma, J.
&
Hon'ble Vinod Diwakar, J.)

1. In an application under section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the **"Cr.P.C."**) being Application U/S 482 Cr.P.C. No.43713 of 2022 (Sushil Kumar Singh v. State of U.P. & Anr.), a learned Single Judge, while deciding the case on 22.3.2023, had held that an application under section 482 Cr.P.C. filed for the quashing of the entire proceedings of a particular Sessions Trial which included the offences under the provisions of Scheduled Castes and Scheduled Tribes (Prevention of

Atrocities) Act, 1989 (hereinafter referred to as the **"SC/ST Act"**) would not be maintainable in view of the provisions of section 14-A of the SC/ST Act. In that case, the learned Single Judge, after referring to the judgments of **Ramawatar v. State of Madhya Pradesh reported in (2022) 13 SCC 635, Hitesh Verma v. State of Uttarakhand & Anr. reported in AIR 2020 SC 5584, Arnit Das v. State of Bihar reported in 2000 (5) SCC 488, In Re: Provisions of Section 14-A of the SC/ST (Prevention of Atrocities) Amendment Act, 2015 (CRIMINAL WRIT - PUBLIC INTEREST LITIGATION No.8 of 2018)** decided on 10.10.2018 and on **Ghulam Rasool Khan & Ors. v. State of U.P. & Ors.** reported in **AIR Online 2022 All 68 (FB)**, concluded that when an enactment for redressal of grievances creates a statutory remedy, the exercise of inherent powering by way of entertaining a petition under section 482 Cr.P.C. could not be done.

2. However, another learned Single Judge in another case, **Application U/S 482 Cr.P.C. No.11043 of 2023 (Devendra Yadav & Ors. v. State of U.P. & Anr.),** while deciding the case on 10.4.2023, had held, again relying upon the judgments of Ramawatar (supra) and specifically relying upon paragraph nos.9 and 16 of that judgment, that even if the statutory appeal under section 14-A of the SC/ST Act was available, the application under section 482 Cr.P.C. could be entertained keeping in view the judgments of the Supreme Court in Ramawatar (supra) and B.Venkateswaran & Ors. v. P. Bakthavatchalm reported in AIR 2023 SC 262.

3. Confronted by these two judgments, a learned Judge of our Court, on 20.9.2023, referred the matter to a Larger Bench after framing the following questions :

*"1. The first Question involved in this batch of Applications under Section 482 of the Code of Criminal Procedure, 1973 (for short, 'the Code') is whether a challenge laid to the entire proceedings of a case under the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (for short, 'the SC/ ST Act') with no challenge to any interlocutory order i.e. a summoning order, would be within the mischief of the rule laid down in answer to Question No. (II) by the Full Bench in* ***Ghulam Rasool Khan v. State of U.P. and others, 2022 (8) ADJ 691 (FB) (LB).***

*2. The allied and second Question involved is whether a challenge to a proceeding under the SC/ ST Act can be laid before this Court through an Application under Section 482 of the Code, in view of the principle in the Full Bench in* ***Ghulam Rasool Khan*** *(supra), where along with proceedings, the order taking cognizance and summoning the applicant is also challenged.*

*3. The third and a corollary to the aforesaid questions is: Whether there is a conflict of opinion between the learned Single Judge of this Court in* ***Sushil Kumar Singh v. State of U.P. and another, (2023) 123 ACC 544 and Devendra Yadav and others v. State of U.P. and another, 2023 (5) ADJ 452,*** *necessitating reference to a larger bench."*

4. While the facts of the leading case of Abhishek Awasthi @ Bholu Awasthi in Application U/S 482 No.8635 of 2023 were taken into consideration while referring the matter, learned Single Judge had also given the gist of the other 19 cases, which were before him.

5. Learned counsel for the applicant in the Application U/S 482 No.8635 of 2023 (Abhishek Awasthi @ Bholu Awasthi v. State of U.P. & Anr.), Shri Jayant Kumar has, while extending his arguments, drawn the attention of the Court to the **Question No. (iii)** which was framed in the judgment of **Ghulam Rasool Khan (supra)**, and the same is being reproduced here as under:

*"(iii) Whether an aggrieved person who has not availed of the remedy of an appeal under the provisions of Section 14 A of Act 1989 can be allowed to approach the High Court by preferring an application under the provisions of Section 482 of the Cr.P.C.? "*

6. Learned counsel for the applicant has submitted that the Full Bench of this Court has held the answer to Question No. (iii) would be in the negative. It was held that an aggrieved person having remedy of appeal under Section 14-A of the 1989 Act could not be allowed to invoke the inherent jurisdiction of this Court under Section 482 Cr.P.C. Learned counsel for the applicant has submitted that the judgment of the Full Bench has not considered the case of **Ramawatar (supra)**. He has relied explicitly while referring to the judgment of **Ramawatar (supra)**, paragraphs nos.9 and 16 of it, and the same are being reproduced here as under:

*"9. Having heard learned Counsel for the parties at some length, we are of the opinion that two questions fall for our consideration in the present appeal. First, whether the jurisdiction of this Court under Article 142 of the Constitution can be invoked for quashing of criminal proceedings arising out of a 'non-compoundable offence? If yes, then whether the power to quash proceedings can be extended to offences arising out of special statutes such as the SC/ST Act?*

*16. On the other hand, where it appears to the Court that the offence in Question, although covered under the SC/ST Act**, is primarily private or civil in nature or where the alleged offence has not been committed on account of the caste of the victim, or where the continuation of the legal proceedings would be an abuse of the process of law, the Court can exercise its powers to quash the proceedings. On similar lines, when considering a prayer for quashing on the basis of a compromise/settlement, if the Court is satisfied that the underlying objective of the Act would not be contravened or diminished even if the felony in Question goes unpunished, the mere fact that the offence is covered under a 'special statute' would not refrain this Court or the High Court, from exercising their respective powers under Article 142 of the Constitution or Section 482 Cr.P.C."***

7. Shri Kumar, Learned counsel for the applicant, has also referred to the judgment of **Ram Gopal v. State of Madhya Pradesh reported in AIR Online 2021 SC 807**. This decision is dated 29.9.2021. Learned counsel for the applicant has submitted, while referring to paragraph 20 of that judgment, that compounding of offences where the occurrence involved could be categorized as purely personal or was having overtones of criminal proceedings of private nature and also by looking into the nature of injuries incurred therein, the powers under section 482 Cr.P.C. could be invoked, and the entire case could be quashed. He has also relied upon the judgment of B. Venkateswaran (supra) decided by the Supreme Court on 5.1.2023. He has

submitted while referring to paragraph 3.0 that a purely civil dispute between the parties is converted into criminal proceedings, and the case is tried for offences under sections 3(i)(v) and (v)(a) of the SC/ST Act then definitely the Court can interfere and stop the abuse of the process of law and the Court. This judgment, learned counsel stressed, has gone to the extent of saying that the High Court should quash the criminal proceedings in exercising powers under section 482 Cr.P.C. The relevant paragraphs i.e. paragraph nos.3.0 and 4.0 of the judgment as has been relied on by the learned counsel in **B. Venkateswaran (supra)** are extracted here as under:

*"3.0. We have heard Shri Nagamuthu, learned senior counsel for the appellants – original accused and the respondent appearing in person. We have also gone through the complaint and considered the allegations in the complaint made against the accused. Having considered the allegations in the complaint and the material on record, it appears that initiation of the criminal proceedings by the respondent against the appellants – original accused for the offence under the provisions of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 is nothing but an abuse of process of law and the Court and also provision of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989. It appears that a private dispute was going on between the parties with respect to the illegal construction. As per the allegations in the complaint, the original complainant had purchased the vacant land and constructed the building. It is alleged that adjacent to his house and on the common pathway, the accused have unlawfully encroached upon the pathway and started constructing the temple and thereby have put up illegal construction on his water pipeline, sewage pipeline and EB Cable. In the entire complaint, there are no allegations that the complainant is obstructed and / or interfered with enjoyment of his right on his property deliberately and willfully knowing that complainant belongs to SC/ST. From the material on record, it appears that a civil dispute is converted into criminal dispute and that too for the offence under the provisions of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989. Prior to filing of the complaint, it appears that the temple was already in existence since many years. The complainant, who resides adjacent to the temple, filed WP No. 1272 of 2007 before the Madras High Court. Pursuant to the order passed by the High Court, the Commissioner of Corporation, Chennai conducted the inspection and found that there was absolutely no encroachment by the temple. It appears that thereafter the complainant filed another Writ Petition No. 30326 of 2013 before the Madras High Court. The High Court directed the official respondent to proceed with the inquiry against both the parties. At this stage, it is required to be noted that it was the case on behalf of the original accused that in fact complainant had violated all building norms and had constructed a building in blatant violation of the set-back rules and had also put up unauthorized construction on the ground floor and first floor. That thereafter, the Temple filed writ petition being No.3322 of 2017 before the High Court. The Division Bench of the High Court vide order dated 10.2.2017 stayed the proceedings against temple. It appears that thereafter the complainant filed a private complaint for the aforesaid offences under the provisions of the Scheduled*

*Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989. From the aforesaid, it seems that the private civil dispute between the parties is converted into criminal proceedings. Initiation of the criminal proceedings for the offences under Sections 3(1)(v) and (va) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, therefore, is nothing but an abuse of process of law and Court. From the material on record, we are satisfied that no case for the offences under Sections 3(1)(v) and (va) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 is made out, even prima facie. None of the ingredients of Sections 3(1)(v) and (va) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 are made out and/ or satisfied. Therefore, we are of the firm opinion and view that in the facts and circumstances of the case, the High Court ought to have quashed the criminal proceedings in exercise of powers under Section 482 of the Code of Criminal Procedure. The impugned judgment and order passed by the High Court, therefore, is unsustainable and the same deserves to be quashed and set aside and the criminal proceedings initiated against the appellants deserves to be quashed and set aside.*

*4.0. In view of the above and for the reasons stated above, present appeal succeeds. The impugned judgment and order passed by the High Court dismissing the writ petition is hereby quashed and set aside. The criminal proceedings initiated against the appellants, initiated by the respondent herein – original complainant for the offence under Sections 3(1)(v) and (va) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 including summons issued by the learned Special Court in a private complaint filed by the respondent herein are hereby quashed and set aside. The present appeal is allowed accordingly."*

8. Learned counsel for the applicant next referred to another judgment of the Supreme Court passed in Hitesh Verma (supra) and submitted that though the object of the SC/ST Act was to improve the socio-economic conditions of the Scheduled Caste and Scheduled Tribes, as they were denied a number of civil rights, and if the Court finds that due to a civil dispute, proceedings under the SC/ST Act has been initiated then the entire proceedings could be quashed. He further submits that the Supreme Court had taken cognizance of the matter and has held that the application under section 482 Cr.P.C. could also be entertained after the submission of even the charge sheet. Shri Jayant Kumar, learned counsel for the applicant, after that, referred to the Full Bench judgment of this Court passed in **In Re: Provisions of Section 14(a) of SC/ST (Prevention of Atrocities) Amendment Act, 2015** reported in **2018 Cr.L.J. 5010** and invited the attention of the Court to the questions as were reformulated for the consideration of the Full Bench and the same are being reproduced here as under for easy understanding:

*"The questions formulated for the consideration of this Full Bench on the suo-moto petition read thus:*

*"A. Whether by virtue of the provisions of the Scheduled Castes and the Scheduled Tribes (Amendment ) Act, 2015 the powers of the High Court under Articles 226/227 or its revisional powers or the powers under Section 482 Cr.P.C. shall stand ousted?*

*B. Whether the amended provisions of Section 14 A would apply to*

*offenses or proceedings initiated or pending prior to 26 January 2016?*

*C. Whether upon the expiry of the period of limitation for filing of an appeal as specified in the second proviso to Section 14 (A) (3), Section 439 Cr.P.C. and the powers conferred on the High Court in terms thereof would stand revived.*

*D. Whether the power to directly take cognizance of offenses shall be exercisable by the existing Special Courts other than the Exclusive Special Courts or Special Courts to be specified under the amended Section 14?"*

9. Learned counsel without referring to the facts of the case to save the Court's time, straight referred to the answers responded by the Full Bench of this Court, which are extracted herein below:

*"In light of the above discussion, our answer to the Questions formulated are as follows:*

*A. Whether provisions of sub-section (2) of Section 14-A and the second proviso to sub-section (3) of Section 14-A of the Amending Act, are violative of Articles 14 and 21 of the Constitution, being unjust, unreasonable and arbitrary?*

*While we reject the challenge to section 14A (2), we declare that the second proviso to Section 14A (3) is clearly violative of both Articles 14 and 21 of the Constitution. It is not just manifestly arbitrary, it has the direct and unhindered effect of taking away the salutary right of a first appeal which has been recognised to be an integral facet of fair procedure enshrined in Article 21 of the Constitution. The absence of discretion in the Court to consider condonation of delay even where sufficient cause may exist renders the measure wholly capricious, irrational and excessive. It is consequently struck down.*

*B. Whether in view of the provisions contained in Section 14-A of the Amending Act, a petition under the provisions of Article 226/227 of the Constitution of India or a revision under Section 397 of the Code of Criminal Procedure or a petition under Section 482 Cr.P.C., is maintainable. OR in other words, whether by virtue of Section 14-A of the Amending Act, the powers of the High Court under Articles 226/227 of the Constitution or its revisional powers or the powers under Section 482 Cr.P.C. stand ousted ?*

***We therefore answer Question (B) by holding that while the constitutional and inherent powers of this Court are not "ousted" by Section 14A, they cannot be invoked in cases and situations where an appeal would lie under Section 14A**. Insofar as the powers of the Court with respect to the revisional jurisdiction is concerned, we find that the provisions of Section 397 Cr.P.C. stand impliedly excluded by virtue of the special provisions made in Section 14A. This, we hold also in light of our finding that the word "order" as occurring in sub-section(1) of Section 14A would also include intermediate orders.*

*C. Whether the amended provisions of Section 14-A would apply to offences or proceedings initiated or pending prior to 26 January 2016?*

*We hold that the provisions of Section 14A would be applicable to all judgments, sentences or orders as well as orders granting or refusing bail passed or pronounced after 26 January, 2016. We further clarify that the introduction of this provision would not effect proceedings instituted or pending before this Court provided they relate to a judgment, sentence or order passed prior to 26 January 2016. The applicability of Section*

*14A does not depend upon the date of commission of the offence. The determinative factor would be the date of the order of the Special Court or Exclusive Court.*

*D. Whether upon the expiry of the period of limitation for filing of an appeal as specified in the second proviso to Section 14-A (3), Section 439 Cr.P.C. and the powers conferred on the High Court in terms thereof would stand revived ?*

*We hold that the powers conferred on the High Court under Section 439 Cr.P.C. do not stand revived. We find ourselves unable to sustain the line of reasoning adopted by the learned Judge in Rohit that the provisions of Section 439 Cr.P.C. would remain in suspension during the period of 180 days and thereafter revive on its expiry. The conclusion so arrived at cannot be sustained on any known principle of statutory interpretation. We are therefore, constrained to hold that both Janardan Pandey as well as Rohit do not lay down the correct law and must, as we do, stand overruled.*

*E. Whether the power to directly take cognizance of offences shall be exercisable by the existing Special Courts other than the Exclusive Special Courts or Special Courts to be specified under the amended Section 14?"*

*The existing Special Courts do not have the jurisdiction to directly take cognisance of offences under the 1989 Act. This power stands conferred only upon the Exclusive Special Courts to be established or the Special Courts to be specified in terms of the substituted section 14. However it is clarified that the substitution of Section 14 by the Amending Act does not have the effect of denuding the existing Special Courts of the authority to exercise jurisdiction in respect of proceedings under the 1989 Act. They would merely not have the power to directly take cognizance of offences and would be bound by the rigours of Section 193 Cr.P.C. Even if cognizance has been taken by the existing Special Courts directly in light of the uncertainty which prevailed, this would not ipso facto render the proceedings void ab initio. Ultimately it would be for the objector to establish serious prejudice or a miscarriage of justice as held in Rati Ram."*

10. Referring to the answer to Question "B", he specifically states that the constitutional and inherent powers of this Court can not be ousted by section 14-A of the SC/ST Act. Further, he submits that they can not be invoked in cases and situations where the statutory appeal would definitely lie under section 14-A of the SC/ST Act.

11. Learned counsel for the applicant thereafter referred to **Ghulam Rasool Khan's (supra)** judgment and read out the questions placed before that Full Bench. The answers given by the Full Bench in **Ghulam Rasool Khan (supra)** were also read out and, therefore, after reproducing the questions, we are also reproducing the answers given by the Full Bench, and the same are as follows:

**QUESTIONS**

*"(i) Whether a Single Judge of this Court while deciding Criminal Appeal (Defective) No. 523/2017 In re : Rohit Vs. State of U.P. and another vide judgment dated 29.08.2017 correctly permitted the conversion of appeal under Section 14 A of the Act, 1989 into a bail application by exercising the inherent powers under Section 482 of the Cr.P.C.?*

*(ii) Whether keeping in view the judgment of Rohit (supra), an aggrieved*

*person will have two remedies available of preferring an appeal under the provisions of Section 14 A of the Act, 1989 as well as a bail application under the provisions of Section 439 of the Cr.P.C.?*

*(iii) Whether an aggrieved person who has not availed of the remedy of an appeal under the provisions of Section 14 A of Act, 1989 can be allowed to approach the High Court by preferring an application under the provisions of Section 482 of the Cr.P.C.?*

*(iv) What would be the remedy available to an aggrieved person who has failed to avail the remedy of appeal under the provision of Act, 1989 and the time period for availing the said remedy has also lapsed? "*

***ANSWERS***

*"(i) Question No.(I) is answered in negative as Rohit Vs State of U.P. and another, (2017) 6 ALJ 754 has been overruled by Full Bench of this Court in In Re : Provision of section 14 (a) of SC/ST (Prevention of Atrocities) Amendment Act, 2015, (2018) 6 ALJ 631.*

*(ii) Question No.(II) is answered in negative holding that an aggrieved person will not have two remedies namely, i.e. filing an appeal under Section 14-A of the 1989 Act as well as filing a bail application in terms of Section 439 Cr.P.C.*

*(iii) Question No.(III) is answered in negative holding that the aggrieved person having remedy of appeal under Section 14A of the 1989 Act, cannot be allowed to invoke inherent jurisdiction of this Court under Section 482 Cr.P.C.*

*(iv) Question No.(IV) - There will be no limitation to file an appeal against an order under the provisions of 1989 Act. Hence, the remedies can be availed of as provided."*

12. Shri Jayant Kumar, learned counsel for the applicant after that, submitted that the judgment of **Ghulam Rasool Khan (supra)** was passed on 28.7.2022 and that it had not taken into consideration the judgments of the Supreme Court in **Hitesh Verma (supra)** dated 5.9.2020; **Ram Gopal (supra)** dated 21.9.2021 and **Ramawatar (supra)** dated 25.10.2021. He further submits that the judgment of the Supreme Court in **B. Venkateswaran (supra)** dated 5.1.2023 has categorically held that the complaints for the offences under section 3(i)(v) and (v)(a) of the SC/ST Act including the summons issued by the learned Special Court could be quashed under the inherent powers of the High Court.

13. Learned counsel for the applicant has also referred to a judgment of the Supreme Court in **Gulam Mustafa v. State of Karnataka** reported in **AIR 2023 SC (Criminal) 966** decided on 10.5.2023 and has submitted that if there was a miscarriage of justice by the filing of a case under the provisions of the SC/ST Act then the High Court could use its inherent powers under section 482 Cr.P.C. or even under the Constitution of India to quash the FIR and this would also mean that the High Court has powers to quash the charge sheet and the order of cognizance in the case therein.

14. Learned counsel for the applicant, therefore, submitted that the answer to the first Question referred by the learned Single Judge in Application **U/S 482 No.8635 of 2023 (Abhishek Awasthi @ Bholu Awasti v. State of U.P.)** should be that where the entire proceedings under the SC/ST Act are to be quashed, the same can be so done under the inherent powers of the High Court i.e. under Articles 226 and 227

of the Constitution of India and also under section 482 Cr.P.C. He also submits, relying upon the judgment of the Supreme Court in **B. Venkateswara (supra),** that all interlocutory orders, including summoning orders, etc., etc., could be looked into by the High Court under its inherent jurisdiction. He submits that Question No.3 in the case of **Ghulam Rasool Khan (supra),** which was to the effect that whether a person aggrieved by orders under the SC/ST Act has not availed the remedy of appeal, could be allowed to approach the High Court by preferring an application under the provisions of section 482 Cr.P.c., has been answered by saying that a person who could, under section 14-A of the SC/ST Act, file an appeal and if he has not so done then he should not avail the remedy of filing any application for invoking the inherent jurisdiction of the High Court. He, however, submits that definitely, the provisions contained in section 14-A of the SC/ST Act did not oust the inherent jurisdiction of the High Court if the remedy as per the judgments of the Supreme Court in **Hitesh Verma (supra); Ram Gopal (supra); Ramawatar (supra), B. Venakateswaran (supra) and Gulam Mustafa (supra) under 482 Cr.P.C.** are available to the applicant.

15. While this case was being argued, certain other members of the Bar have also assisted the Court.

16. Shri Sushil Shukla, Advocate, submitted that the Supreme Court in **Prabhu Chawla v. State of Rajasthan & Anr.** reported in (2016) 16 SCC 30 has held that all inherent powers of the High Court when there has been an abuse of the process of Court could be used by the High Court. He nest submitted that the only limitation is self-restraint and nothing more. He next submits that the judgment of the Supreme Court in **Prabhu Chawla (supra)** has relied upon the judgment of the Supreme Court in **Madhu Limaye v. State of Maharashtra** reported in **(1977) 4 SCC 551**. He further relied upon the judgment of the Supreme Court in Punjab State Warehousing Corporation, **Faridkot v. Shree Durga Ji Traders & Ors. reported in (2011) 14 SCC 615** and has submitted that the remedy of appeal against any order provided under the Cr.P.C. or in any other Act itself did not operate as an absolute bar in entertaining an application under section 482 Cr.P.C. He again reiterated the law as pointed out by the earlier counsel passed by the Supreme Court in **Ramawatar (supra)** and **Ram Gopal (supra).** He referred to the judgment of the Supreme Court passed in **Satya Narayan Sharma v. State of Rajasthan reported in (2001) 8 SCC 607**, which propounded that the inherent power of the High Court under section 482 Cr.P.C. could not be exercised against the express provisions of law enacted in any special Act. He has submitted that the judgment of the Supreme Court in **Asian Resurfacing of Road Agency Private Ltd. & Anr. v. CBI reported in (2018) 16 SCC 299** has held that the inherent power of a Court set up by the Constitution is a power that inherits in such Court because it is a superior Court of record and not because it is conferred by the Cr.P.C. or any other provision of law and states that the law in **Satya Narayan Sharma (supra)** has been overruled. The relevant paragraph i.e. paragraph 54 of the judgment of the Supreme Court in **Asian Resurfacing of Road Agency Pvt. Ltd. (supra),** is being reproduced here as under:

*"It is thus clear that the inherent power of a Court set up by the Constitution is a power that inheres in such Court*

*because it is a superior court of record, and not because it is conferred by the Code of Criminal Procedure. This is a power vested by the Constitution itself, inter alia, under Article 215 as aforestated. Also, as such High Courts have the power, nay, the duty to protect the fundamental rights of citizens under Article 226 of the Constitution, the inherent power to do justice in cases involving the liberty of the citizen would also sound in Article 21 of the Constitution. This being the constitutional position, it is clear that Section 19(3)(c) cannot be read as a ban on the maintainability of a petition filed before the High Court under Section 482 of the Code of Criminal Procedure, the non-obstante clause in Section 19(3) applying only to the Code of Criminal Procedure. The judgment of this Court in Satya Narayan Sharma v. State of Rajasthan, (2001) 8 SCC 607 at paragraphs 14 and 15 does not, therefore, lay down the correct position in law. Equally, in paragraph 17 of the said judgment, despite the clarification that proceedings can be "adapted" in appropriate cases, the Court went on to hold that there is a blanket ban on stay of trials and that, therefore, Section 482, even as adapted, cannot be used for the aforesaid purpose. This, again, is contrary to the position in law as laid down hereinabove. This case, therefore, stands overruled."*

17. He, submits that inherent powers being all pervasive, their exercise cannot be barred against either the express or alternative provisions engrafted within the Cr.P.C. or in any other special enactment. He, therefore, submits that the provisions of section 14-A cannot operate as a complete bar in entertaining any application under section 482 Cr.P.C. for quashing the criminal proceedings.

18. Shri V.P. Srivastava, a learned Senior Advocate, also appeared in this case and argued that in the celebrated case of **Mohd. Hafiz v. State & Ors.** reported in **1977 (14) ACC 288,** this Court has held that Section 482 of the Code of Criminal Procedure is a short reminder to the High Courts that they are not merely courts of law but also the Courts of justice, and as such, they possess inherent powers to remove injustice. The power of the High Court under section 482 Cr.P.C. are wide enough to protect personal liberty when the same is put in jeopardy owing to the enforcement of a wholly fictitious order. He has taken the Court through the judgment of the Supreme Court passed in **Madhu Limaye (supra); Maneka Gandhi v. Union of India & Anr. reported in (1978) 1 SCC 248 a d State of Haryana & Ors. v. Bhajan Lal & Ors.** reported in **1992 Supp. (1) SCC 335** and has submitted that certain categories of cases could always be entertained under Article 226 of the Constitution of India or under the inherent powers of section 482 Cr.P.C. either to prevent the abuse of the process of any Court or otherwise to secure the ends of justice. He has submitted that it was not possible to lay down precise and clear guidelines, but referring to the judgment of the Supreme Court in **State of Haryana & Ors. v. Hajan Lal (supra)**, he submitted that there were certain categories of cases where the inherent powers of the High Court shall be used. The relevant paragraphs of the judgment of State of **Haryana & Ors. v. Bhajan Lal & Ors.** are being reproduced here as under:

*"102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in series of decisions relating to*

*the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.*

*(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.*

*(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.*

*(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.*

*(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.*

*(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.*

*(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.*

*(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."*

19. While referring to the judgment of **Bhajan Lal (supra),** Learned Senior Counsel also referred to paragraph no.103, where the Supreme Court has cautioned that the power of quashing criminal proceedings is to be exercised very sparingly and with circumspection and that too in the rarest of rare cases. He further submitted that it should not be justified in embarking upon an enquiry as to the reliability and the genuineness or otherwise of the allegations made in the FIR or the complaint, and he submits that the extraordinary or inherent powers do not confer upon the High Court any arbitrary jurisdiction to act according to its whims and caprice.

20. Ms. Vijeta Singh, learned Advocate, submits that the nature and scope of the inherent power of the High Court is to save the inherent power to make such orders as may be necessary to give effect to any order under this Court or to

prevent abuse of the process of any court or otherwise to secure the ends of justice. There is no doubt that the inherent power cannot be exercised in regard to matters specifically covered by the other provisions of the Code. In support of her arguments she relied upon **R.P. Kapur v. State of Punjab AIR 1960 SC 866.**

21. She next submits that if any intermediate order is passed by a Special Court or an exclusive Special Court in a case relating to an offence in the SC/ST Act, that will come in the category of order as provided under section 14-A(1) of the SC/ST Act against which only an appeal shall lie before the Court, both in facts and law; therefore, application u/s 482 Cr.P.C. cannot be filed against a summoning order, and thus relied upon **Anuj Kumar @ Sanjay and others v. State of U.P. and others** passed by this Court in Application u/s 482 No.2763 of 2022.

22. She next submits that though section 482 Cr.P.C. does not restrict or limit the inherent, inbuilt power of the High Court, further, it does not mean that it puts a blanket or is superior to all other provisions of law. The word "nothing" instead of "notwithstanding" has been used in the section, which shows the legislature's intention that the provision is a saving clause. Whereas the word *"notwithstanding"* in section 14-A of SC/ST Act denotes that the provision has an overriding power on the general Act, which makes it a non-obstante clause and to bolster her arguments, relied upon **Union of India and others v. G.M. Kokil and others, (AIR 1984 SC 1022)** in which it has been held that a *non-obstante* clause is a legislative device employed to give overriding effect to certain provisions over some contrary provisions that may be found either is a same enactment or some other enactment to provide the operation and effect of all contrary provisions.

23. She next submits that to reconcile the non-obstante clause under two legislation, the approach of the Court should be to determine as to which Act shall prevail, and it shall depend on various factors such as **(i)** the purpose of two legislation, **(ii)** which of the two laws is general or special; and **(iii)** which law is later. In the instant case, section 482 Cr.P.C. is a general law, whereas section 14-A of the SC/ST Act 1989 is a special law. Section 5 of the Code of Criminal Procedure is also a saving clause that states that the Code of Criminal Procedure shall not affect any special or local law or any special jurisdiction or power conferred by any special form of procedure prescribed by any other law for the time being in force.

24. A statute is the edict of the legislature. It expresses the will of the legislature, and the function of the Court is to interpret the documents according to the intent of those who made them. It is a settled rule of construction of the statute that the provision should be interpreted by applying the plain rule of construction. The Courts normally would not imply anything that is inconsistent with the words expressly used by the statute.

25. Based on the aforesaid deliberations, she further states that the SC/ST Act has been specially enacted to deter acts of indignity, humiliation, and harassment against the members of the scheduled castes and scheduled tribes; however, it will be extremely circumspect in its approach when dealing with offences arising out of special statutes.

26. She next submits that a focus glance at the provision contained in section 14-A(1) of the SC/ST Act shows that the special provision has been carved out relating to an appeal by providing that notwithstanding anything contained in the Code of Criminal Procedure, an appeal shall lie. This sub-section starts with a non-obstante clause, and consequently, in case of any conflict or inconsistency, the provisions of section 14-A(1) shall prevail over the general provisions. The said section was brought by an amendment with effect from 26.1.2016 with the objective to give effect to the concept of speedy trial of the offences committed against the persons who belong to the scheduled castes and scheduled tribes. Therefore, section 14-A(1) of the SC/ST Act makes an express provision for an appeal to be preferred to the High Court, both on facts and law.

27. Shri Amit Sinha and Ms. Archana Singh learned A.G.A. assisted by Ms. Mayuri Mehrotra, learned brief holder, however, submitted that if the Full Bench decision of this Court in **In Re : Provision of Section 14A of SC/ST Act (Prevention of Atrocities) Amendment Act, 2015 (supra) and Ghulam Rasool Khan (supra)** is read and understood conjointly, then it would become evident that the inherent powers of the High Court in view of the provisions of section 14-A of the SC/ST Act which start with a non-obstante clause, could not be exercised. Learned counsel for the State, since had drawn the attention of the Court to section 14-A of the SC/ST Act, the same is being reproduced here as under:

*"[14A. Appeals.--(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), an appeal shall lie, from any judgment, sentence or order, not being an interlocutory order, of a Special Court or an Exclusive Special Court, to the High Court both on facts and on law.*

*(2) Notwithstanding anything contained in sub-section (3) of section 378 of the Code of Criminal Procedure, 1973 (2 of 1974), an appeal shall lie to the High Court against an order of the Special Court or the Exclusive Special Court granting or refusing bail.*

*(3) Notwithstanding anything contained in any other law for the time being in force, every appeal under this section shall be preferred within a period of ninety days from the date of the judgment, sentence or order appealed from:*

*Provided that the High Court may entertain an appeal after the expiry of the said period of ninety days if it is satisfied that the appellant had sufficient cause for not preferring the appeal within the period of ninety days:*

*Provided further that no appeal shall be entertained after the expiry of the period of one hundred and eighty days.*

*(4) Every appeal preferred under sub-section (1) shall, as far as possible, be disposed of within a period of three months from the date of admission of the appeal.]"*

28. He submits that though section 482 Cr.P.C. gives immense powers to the High Court and is an enabling provision that enables a litigant to knock on the doors of the High Court and invoke the inherent powers of it, the same would not mean that it was superior to all the provisions of Cr.P.C. and the other Acts.

29. Having heard learned counsel for the parties who appeared for the applicants, learned counsel appeared from the Bar to assist the Court and the learned A.G.A.;

this Court is of the view that in **Ghulam Rasool Khan (supra),** the then question No.III was to the effect when a person had not availed the remedy of appeal under the provisions of section 14-A of the SC/ST Act, could it then be allowed to approach the High Court by preferring an application under the provisions of section 482 Cr.P.C. and the Full Bench had answered the Question by observing that the Full Bench of this Court has already dealt the Question in In **Re: Provisions of Section 14-A of the SC/ST (Prevention of Atrocities) Amendment Act, 2015 (supra)** wherein the Question was answered whether in view of the provisions contained in section 14-A of the Amending Act, a petition under the provisions of Articles 226 and 227 of the Constitution or a Revision under section 397 of the Code of Criminal Procedure or a petition under section 482 Cr.P.C. was maintainable or in other words, whether by virtue of section 14-A of the Amending Act, the powers of the High Court under Articles 226 and 227 of the Constitution or its revisional power shall stand ousted. In the judgment of the **Ghulam Rasool Khan (supra),** the answer of the Full Bench was that against the judgments and orders for which remedy has been provided under section 14-A of the SC/ST Act invoking the jurisdiction of the High Court under Articles 226 or 227 of the Constitution or under section 482 Cr.P.C. was not recommended and, therefore, the Question No.III had been answered in the negative. It has been said that if an aggrieved person has a remedy of appeal under section 14-A of the SC/ST Act, he or she could not be allowed to invoke the inherent jurisdiction of the High Court under section 482 Cr.P.C.

30. We are conscious of the fact that the Full Bench of the Allahabad High Court in the case of **Ghulam Rasool Khan (supra)** had answered the Question as it was before it. In the instant case, the Question that has been posed before this Bench is as to whether when there was a challenge led to the entire proceedings of the case under the provisions of SC/ST Act with no challenge to any interlocutory order i.e. the summoning order then would the law as had been laid down by the Full Bench in **Ghulam Rasool Khan (supra)** prevent the aggrieved person from approaching the Court under section 482 Cr.P.C.

31. This Question has an absolutely different tenor from Question no.III, which the Full Bench answered in **Ghulam Rasool Khan (supra).**

32. In view of all the arguments that have been advanced before us, we are of the definite view that the Supreme Court in the cases of **Hitesh Verma** (supra) dated 5.9.2020 reported in **AIR 2020 SC 5584; Ramgopal (supra)** dated 21.9.2021 reported in **AIR Online 2021 SC 807; Ramawatar (supra) dated 25.10.2021 reported in (2022) 13 SCC 635; B. Venkateswaran (supra) dated 5.1.2023 reported in AIR 2023 SC 262 and in Gulam Mustafa (supra) dated 10.5.2023 reported in AIR 2023 SC (Criminal) 966**, the law as was laid down by the Supreme Court in the cases of **R.P. Kapur (supra)** and **Madhu Limaye (supra)** and the judgment in the case of **Bhajan Lal (supra)** has been consistent. In fact, when by the judgment of **Satya Narayan Sharma (supra)** Supreme Court held that the inherent powers of this Court under section 482 Cr.P.C. could not be exercised against expressed provisions of law engrafted in any other special Act, the same was overruled by a Larger Bench of the

Supreme Court in the case of **Asian Resurfacing of Road Agency Pvt. Ltd. (supra).**

33. Thus, what needs to be understood is that there has to be a distinction between a proceeding being "not maintainable" and "not liable to be entertained". "Not being maintainable" would mean that the proceedings would not lie at all, whereas "not liable to be entertained" would mean that the application, though it would lie, shall not be entertained in the given facts of the case. The distinction may seems to be fine, and at times, it gets blurred, but nevertheless, it does exist and has to be compulsorily kept in mind. Whether an application involving the inherent jurisdiction of the High Court is to be entertained or not is a question to be considered and answered case to a case basis in the given facts- and circumstances of the case, and no general proposition or straight jacket formula could be laid down. The guiding principle is whether, in the given case, the continuance of proceedings would amount to abuse of the process of the Court and/ or whether interference of the High Court is necessary to secure ends of justice.

34. The Single Bench of this Court in **Smt. Usha v. State of U.P. and another (Criminal Appeal No.10230 of 2023)** have dealt with a similar controversy and thus held that since the jurisdiction of the appellate Court is limited, therefore, at least in cases where the trial is has yet to commence or is not pending, the appellate powers cannot always be exercised for setting aside the criminal proceedings on the basis of compromise between the parties. Particularly, in cases of compromise between the parties, the appropriate remedy would be to invoke the inherent powers of the Court under section 482 Cr.P.C. the relevant portion is extracted herein below:

*"32. Recently, the Hon'ble Supreme Court in Ramawatar Vs. State of Madhya Pradesh, (2022) 13 SCC 635, again examined the inherent powers of the High Court contained in Section 482 Cr.P.C., specifically in the context of the "Atrocities Act, 1989" and held that where the proceedings are attended with mala fide intentions and would be an abuse of the process of law, the High Court can exercise its powers to quash the proceedings. The relevant observations read as under:*

*15. Ordinarily, when dealing with offences arising out of special statutes such as the SC/ST Act, the Court will be extremely circumspect in its approach. The SC/ST Act has been specifically enacted to deter acts of indignity, humiliation and harassment against members of Scheduled Castes and Scheduled Tribes. The Act also a recognition of the depressing reality that despite undertaking several measures, the Scheduled Castes/Scheduled Tribes continue to be subjected to various atrocities at the hands of upper castes. The Courts have to be mindful of the fact that the Act has been enacted keeping in view the express constitutional safeguards enumerated in Articles 15, 17 and 21 of the Constitution, with a twin-fold objective of protecting the members of these vulnerable communities as well as to provide relief and rehabilitation to the victims of caste-based atrocities.*

*16. On the other hand, where it appears to the Court that the offence in Question, although covered under the SC/ST Act, is primarily private or civil in nature, or where the alleged offence has not been committed on account of the caste*

*of the victim, or where the continuation of the legal proceedings would be an abuse of the process of law, the Court can exercise its powers to quash the proceedings. On similar lines, when considering a prayer for quashing on the basis of a compromise/settlement, if the Court is satisfied that the underlying objective of the Act would not be contravened or diminished even if the felony in Question goes unpunished, the mere fact that the offence is covered under a 'special statute' would not refrain this Court or the High Court, from exercising their respective powers under Article 142 of the Constitution or Section 482 Cr.P.C.*

*33. The above view of the Hon'ble Supreme Court is again reiterated in Gulam Mustafa Vs. The State of Karnataka and Others, AIR 2023 SC 2999, wherein the offences, including the offence under the "Atrocities Act, 1989", were quashed. The relevant part is reproduced:*

*36. What is evincible from the extant case-law is that this Court has been consistent in interfering in such matters where purely civil disputes, more often than no, relating to land and/or money, are given the colour of criminality, only for the purposes of exerting extra-judicial pressure on the party concerned, which, we reiterate, is nothing but abuse of the process of the Court. In the present case, there is a huge, and quite frankly, unexplained delay of over 60 years in initiating a dispute with regard to the ownership of the land in Question, and the criminal case has been lodged only after failure to obtain relief in the civil suits, coupled with denial of relief in the interim therein to the respondent no.2/her family members. It is evident that resort was now being had to criminal proceedings which, in the considered opinion of this Court, is with ulterior motives, for oblique reason and is a clear case of vengeance.*

*37. The Court would also note that even if the allegations are taken to be true on their face value, it is not discernible that any offence can be said to have been made out under the SC/ST Act against the appellant. The complaint and FIR are frivolous, vexatious and oppressive.*

*38. This Court would indicate that the officers who institute an FIR based on any complaint are du y- bound to be vigilant before invoking any provision of a very stringent statute, like the SC/ST Act, which imposes serious penal consequences on the concerned accused. The officer has to be satisfied that the provisions he seeks to invoke prima facie apply to the case at hand. We clarify that our remarks, in no manner, are to dilute the applicability of special/stringent statutes but only to remind the police not to mechanically apply the law, dehors reference to the factual position.*

*39. For the reasons aforesaid, the Court finds that the High Court fell in error in not invoking its wholesome power under Section 482 of the Code to quash the FIR. Accordingly, the Impugned Judgment, being untenable in law, is set aside. Consequent thereupon, the FIR, as also any proceedings emanating therefrom, insofar as they relate to the appellant, are quashed and set aside.*

*34. Also, in many cases where, during the pendency of the cases, if the parties arrive at a compromise, even then, the appeals are filed before this Court under Section 14-A f "Atrocities Act, 1989" for setting aside the entire criminal proceedings including the order taking cognizance of the offences on the strength of the said compromise. But, in the considered opinion of this Court, such an appeal cannot be construed as an*

*appropriate remedy, particularly when the said compromise between the pa ties is not a part of the record of the case pending before the Special Court. The Hon'ble Supreme Court has injected some elasticity in laying down the principles for quashing criminal proceedings, even in non-compoundable offences on the basis of compromise, but all such decisions relate to the exercise of inherent powers vested with High Courts under Section 482 Cr.P.C. In Gian Singh Vs. State of Punjab and another, 2012 (4) RCR (Criminal) 543, the Hon'ble Supreme Court has also discussed the powers of High Court under Section 482 Cr.P.C. and the relevant portion reads as under :*

*"The position that emerges from the above discussion can be summarised thus: the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz; (i) to secure the ends of justice or (ii) to prevent abuse of the process of any Court. In what cases power to quash the criminal proceeding or complaint or F.I.R may be exercised where the offender and victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have serious impact on society. Similarly, any compromise between the victim and offender in relation to the offences under special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that capacity etc; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and predominately civil flavour stand on a different footing for the purposes of quashing, particularly the offences arising from a commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, High Court may quash criminal proceedings if, in its view, because of the compromise between the offender and victim, the possibility of conviction is remote and bleak and the continuation of criminal case would put accused to great oppression and prejudice, and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and wrongdoer and whether to secure the ends of justice, it is appropriate that criminal case is put to an end and if the answer to the above Question (s) is in affirmative, the High Court shall be well within its*

*jurisdiction to quash the criminal proceeding."*

*35. Consequently, in view of the above discussion, as well as in the light of the law laid down by the Hon'ble Supreme Court, it is abundantly clear that even if, Section 14A "Atrocities Act, 1989" provides for a remedy of appeal against an order taking cognizance of the offences, but in a given case, which falls within the guidelines and parameters laid down by the Hon'ble Supreme Court for the exercise of powers under Section 482 Cr.P.C., the said remedy can be availed by the litigant, and availability of alternative statutory remedy cannot be a ground for refusal to exercise the inherent powers under Section 482 Cr.P.C., if the merits of the case makes out a case for exercise of inherent powers under Section 482 Cr.P.C."*

35. The first Question is thus answered by holding that there can be no hard and fast rule regarding the interference of the High Court under its inherent jurisdiction. The High Court can if it finds that by interfering in a particular case, it can prevent the misuse or abuse of the Court or law, then it may always so interfere.

36. We also would like to observe that Question No.III by the Full Bench in **Ghulam Rasool Khan (supra)** did not answer the aforesaid question. Therefore, we answer accordingly; when a challenge lies to the entire proceeding of a case registered under the SC/ST Act, the High Court could entertain the case under its inherent jurisdiction to secure the end of justice. High Courts are not merely Courts of law but also Courts of Justice, and as such, they possess inherent powers to remove injustice.

37. As far as the answers to Questions nos.2 and 3 are concerned, we would like to mention that, as has been held by the Supreme Court in **Gulam Mustafa (supra) decided on 10.5.2023;** the High Court can also look into the correctness and validity of the summoning order, etc., when it takes cognizance of the entire proceeding under Section 482 Cr.P.C. However, when the proceedings are not under challenge under Section 482 Cr.P.C., the only course open to an accused/applicant is to file an appeal under Section 14-A of the SC/ST Act.

38. The reference is, thus, answered.

39. The order passed by us be placed before the Bench concerned.

40. Since an interim order exists, the same shall continue till the decision of the various applications.

41. While parting, apart from recording our appreciation for the hard work which was done by the lawyers who appeared in the various cases, we would like to thank Mr. V.P. Srivastava, learned Senior Advocate, Mr. Sushil Shukla, Ms. Vijeta Singh and Mr. Amit Sinha, learned A.G.A. for their immense assistance in the case.

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**(2024) 11 ILRA 388**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 25.10.2024**

**BEFORE**

**THE HON'BLE MRS. SANGEETA CHANDRA, J.**
**THE HON'BLE MOHD. FAIZ ALAM KHAN, J.**

Criminal Misc. Writ Petition No. 8151 of 2024

**Pundrik Kumar Pandey @ Pundrik Pandey ...Petitioner**

**Versus**

**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Alok Kirti Mishra, Dharmesh Kumar Dwivedi

**Counsel for the Respondents:**
G.A.

Alleged that the impugned F.I.R. is the second F.I.R. on the same set of fact -first FIR was lodged related to a general information regarding the incident where one person was shot during immersion of devi Durga idol as a result whereof crowd got angry and destroyed the shops of the other community -second FIR lodged with regard to the incident where the named accused along with others were holding Dharna Pradarshan -with the body of the deceased-victim- not letting the Authorities from carrying out the autopsy of the deceased-victim- Prima facie, the second FIR is not a part of the same transaction- it is related to a subsequent development-No sufficient grounds found for interference.

**Petitions dismissed.** (E-9)

**List of Cases cited:**

1. Babubhai Vs St. of Guj. & ors.reported in (2010) 12 SCC 254

2. Ram Lal Narang Vs State (Delhi Administration) ,(1979) 2 SCC 322

3. T.T. Antony Vs St. of Kerala, (2001) 6 SCC 181

4. Upkar Singh Vs Ved Prakash (2004) 13 SCC 292

5. Amitbhai Anilchandra Shah Vs Central Bureau of Investigation & anr., (2013) 6 SCC 348

6. Chirra Shivraj Vs St. of Andhra Pradesh (2010) 14 SCC 444,

7. C. Muniappan Vs St. of T.N. (2010) 9 SCC 567

(Delivered by Hon'ble Mrs. Sangeeta Chandra, J.
&
Hon'ble Mohd. Faiz Alam Khan, J.)

1. We have heard Shri Abhishek Srivastava, counsel for the petitioners at length and the learned A.G.A. who appears for the State-respondents and Shri Manoj Kumar Singh, the counsel appearing for the informant, the sitting MLA of Mahasi Constituency, Bahraich.

2. Since both writ petitions arise out of same F.I.R. they are being dealt with by a common order.

3. It is the case of the petitioner-Pundrik Kumar Pandey @ Pundrik Pandey, that the Opposite party no.4, the sitting MLA has been representing Mahasi Constituency for the past 15 years and the applicant-Pundrik Kumar Pandey @ Pundrik Pandey, was earlier working as a Journalist and he used to write against the Opposite party no.4, as a result whereof the Opposite party no.4 became inimical to the petitioner. The petitioner is currently posted as a Teacher in Government Primary School, U.P.S. Chaugoi, Block-Jamuha, District Shravasti, and the deceased Ram Gopal Mishra was the cousin brother-in-law of the petitioner and for this reason the petitioner went along with the dead body of Ram Gopal Mishra to the Dharna site near the Medical College. He wanted to only accompany the body when it was being taken for post mortem. However, more than 5000 people had gathered near the dead body and they were protesting. Since Opposite party no.4 is an influential person he has engineered the lodging of the impugned F.I.R. to settle his personal grudge against the petitioner under Sections 191(2), 191(3), 3(5), 109(1), 324(2), 351(3), 352 & 125 of the B.N.S.

4. The F.I.R. was lodged after eight days of the incident and it is pre-meditated and delayed and lodged after much deliberation. The petitioner has a gun license and the Respondent no.4 wants to get such license cancelled, therefore, a false allegation has been made in the F.I.R. that a shot was fired in air.

5. The Counsel appearing on behalf of the applicants/ petitioners namely Arpit Srivastava, Anuj Kumar Singh @ Anuj Singh Raikwar, Shubham Kumar @ Shubham Mishra in Criminal Misc. Writ Petition No.8254 of 2024 regarding challenge being raised to the same F.I.R. has argued before this Court that the Opposite party no.4, sitting MLA of Mahasi Constituency had lodged the impugned F.I.R. on 18.10.2024 under Sections 191(2), 191(3), 3(5), 109(1), 324(2), 351(3), 352 & 125 of the B.N.S. 2023 at Police Station Kotwali Nagar, District Bahraich, against seven named accused persons namely Arpit Srivastava, Petitioner no.1; Anuj Kumar Singh @ Anuj Singh Raikwar, Petitioner no.2; Shubham Kumar @ Shubham Mishra, Petitioner no.3; Kushmendra Chaudhary, Manish Chandra Shukla, Pundarik Pandey and Subhanshu Singh Rana and some unknown persons in relation to an alleged incident that took place on 13.10.2024. In the F.I.R., the allegation was that the petitioners as well as other co-accused along with several other persons had made it difficult for the Police and the District Administration in getting the dead body of Ram Gopal Mishra to the mortuary and created a ruckus which led to firing of a gun shot in the air and also of smashing of the wind screen of vehicle of the Respondent no.4.

6. It has been submitted that the impugned F.I.R. is the second F.I.R. in relation to the same incident as Shri Dinesh Kumar Pandey, Inspector Incharge of Police Station Kotwali Nagar, District Bahraich, had earlier lodged F.I.R. No.0346 of 2024 on 15.10.2024 under Sections 191(2), 191(3), 3(5), 190, 131, 115(2), 352, 351(3), 125, 326(g), 326(f), 3(5), 121(1) of the B.N.S. 2023 & Criminal Law Amendment Act, 1932 at 09:11 AM at Police Station Kotwali Nagar, District Bahraich, wherein similar facts have been mentioned. It has been submitted that the Petitioner no.1 is a social worker and Nagar Adhyaksh of the Bhartiya Janta Yuva Morcha, Bahraich since 16.09.2021, and he is pursing his career in politics. Petitioner no.2 is also a social worker and a farmer and Petitioner no.3 is a Graduate and presently working in a private Construction Company. The impugned F.I.R. being the second F.I.R. for the same incident ought to be quashed in view of the law settled by the Hon'ble the Supreme Court in the case of ***Babubhai Vs. State of Gujarat and others reported in (2010) 12 SCC 254.***

7. The counsel for the petitioners has pointed out Paragraphs-2 and 3 of the judgment *in Babubhai Vs. State of Gujarat and others,* from perusal whereof it is evident that on 07.07.2008 some altercation took place between members of Bharwad and Koli Patel Communities regarding plying of rickshaws in the area surrounding Dhedhal village of District Ahmedabad, Gujarat. On the next day i.e. on 08.07.2008 a case, Case Crime No.I-154/2008 was registered at 1730 hours in Police Station Bavla, under Sections 147, 148, 149, 302, 307, 332, 333, 436 and 427 of the Penal Code, 1860, for the incident which had occurred at Village Dhedhal wherein the Sub-Inspector of Bavla Police Station had stated that while he was patrolling in Bavla town, he received a message from the

Station House Officer at around 10:00 AM that some altercation/ incident had taken place between two communities at Dhedhal Crossroads. The Sub-Inspector Bavla Police Station thereafter reached the spot where a clash was going on between two communities in Dhedhal Village. He contacted the Police Control Room and the Deputy Superintendent of Police sent re-enforcement and when the police reached the spot around 2000 to 3000 persons from both communities armed with various weapons were attacking each other. The police resorted to lopping tear gas shells as well as lathi charge to disperse the crowd. Ultimately several rounds of firing were resorted to in order to disperse the mob. In the said incident, more than 20 persons were injured and three houses of members of the Bharwad Community were also set on fire. One person also died. Several police personnel were also injured. The said F.I.R. did not mention the name of any accused. However, another F.I.R. bearing Case number, CR No.I-155/2008 was registered at Bavla Police Station on the same day i.e. on 08.07.2008 at 2235 hours by one Babubhai Popatbhai Koli Patel and he alleged that an incident took place on the same day at around 9:15 a.m. in the Morning in Dhedhal Village. In such F.I.R. he named 18 persons as accused. As per the F.I.R., an incident had occurred on 07.07.2008 in the evening at about 06.30 P.M. It also related to plying Rickshaws and Chhakdas and it also related to altercation between Bharwad and Koli Patel Communities. The complainant stated that the named accused persons not only extended threats to the complainant-informant and his cousin but they also halted vehicles on the road. The informant stated that there were 10-12 persons belonging to Bharwad community assaulting his cousin with sticks. He also saw some named accused from Bharwad community of Dhedhal Village having Tamancha like weapons in their hands and instigating other persons to indulge in violence he named several accused and stated that they assaulted his cousin as well as other Rickshaw pullers saying that they should not pass through the road which belonged to Bharwads. The complainant tried to rescue his cousin but they were stopped and such named accused started the assaulting and abusing him. The informant made specific mention of certain accused inflicting sticks blows on his cousin due to which he became unconscious and the mob thereafter beat up his cousin and other Bharwads from Dhedhal village had also arrived. The details in the F.I.R. related to the vehicles that were stopped and also related to specific incident of the cousin of the informant being attacked with deadly weapons like Revolver and Sticks etc. causing serious injuries.

8. From a perusal of the facts as mentioned in the judgment cited before us in *Babubhai,* it is evident that the accused in both cases filed special criminal applications praying for investigation of the F.I.R. by an Independent Agency like CBI and also praying for quashing of the CR No.I-154 and CR No.I-155/2008 registered at Bavla Police Station.

9. They also prayed for setting aside of the proceedings undertaken by the Sessions Court. The High Court quashed the F.I.R. registered as CR No.I-155/2008 and clubbed the investigation of the F.I.R. along with investigation of the other F.I.R. bearing CR No.I-154 of 2008 to the extent it was feasible. The Court also transferred the investigation to the State CID Crime Branch and directed a new Investigating

Officer to investigate with a further clarification that quashing of their subsequent F.I.R. would not mean that the accused in respect of the second F.I.R. had been discharged of the offences as they would continue to face the charges in the initial Criminal Case CR No.I-154 of 2008 in which they also stood arrested.

10. The Supreme Court while considering the Appeal preferred by the appellants who were the accused, noted the arguments raised by the learned Senior Counsel appearing for the parties in the Appeal that the High Court reached the correct conclusion that both crimes were two parts of the same transaction and they occurred at the same place and the version given by Babubhai Popatbhai Koli Patel in CR No.I-155 of 2008 cannot be considered a counter version giving rise to a cross case. The Senior counsel had requested the Supreme Court to dismiss the Appeal. However, the Supreme Court after considering the law as laid down in ***Ram Lal Narang Vs. State (Delhi Administration) reported in (1979) 2 SCC 322, and in T.T. Antony Vs. State of Kerala reported in (2001) 6 SCC 181,*** made observations in Paragraph-13 & 14 which are being quoted hereinbelow:-

*"13. In **Ram Lal Narang v. State (Delhi Admn.)** this Court considered a case wherein two FIRs had been lodged. The first one formed part of a subsequent larger conspiracy which came to light on receipt of fresh information. Some of the conspirators were common in both the FIRs and the object of conspiracy in both the cases was not the same. This Court while considering the question as to whether investigation and further proceedings on the basis of both the FIRs was permissible held that no straitjacket formula can be laid down in this regard. The only test whether two FIRs can be permitted to exist was whether the two conspiracies were identical or not. After considering the facts of the said case, the Court came to the conclusion that both conspiracies were not identical. Therefore, lodging of two FIRs was held to be permissible.*

*14. In **T.T. Antony v. State of Kerala** this Court dealt with a case wherein in respect of the same cognizable offence and same occurrence two FIRs had been lodged and the Court held that: "There can be no second FIR and no fresh investigation on receipt of every subsequent information in respect of the same cognizable offence or same occurrence giving rise to one or more cognizable offences." (emphasis supplied)*

*The investigating agency has to proceed only on the information about commission of a cognizable offence which is first entered in the police station diary by the officer-in-charge under Section 158 of the Code of Criminal Procedure, 1973 (hereinafter called "CrPC") and all other subsequent information would be covered by Section 162 CrPC. for the reason that it is the duty of the Investigating officer not merely to investigate the cognizable offence reported in the FIR but also other connected offences found to have been committed in the course of the same transaction or the same occurrence and the investigating officer has to file one or more reports under Section 173 CrPC. Even after submission of the report under Section 173(2) CrPC, if the investigating officer comes across any further information pertaining to the same incident, he can make further Investigation, but it is desirable that he must take the leave of the court and forward the further evidence, if any, with further report or*

*reports under Section 173(8) CrPC. In case the officer receives more than one piece of information in respect of the same incident involving one or more than one cognizable offences such information cannot properly be treated as an FIR as it would, in effect, be a second F.I.R. and the same is not in conformity with the scheme of Cr.P.C."*

11. The Court also considered ***Upkar Singh Vs. Ved Prakash reported in (2004) 13 SCC 292***, in Paragraph 16 which is being quoted hereinbelow:-

*"16. This Court considered the judgment in T.T. Antony and explained that the judgment in the said case does not exclude the registration of a complaint in the nature of counterclaim from the purview of the Court. What had been laid down by this Court in the aforesaid case law is that any further complaint by the same complainant against the same accused, subsequent to the registration of a case, is prohibited under Cr.P.C. because an investigation in this regard would have already started and further the complaint against the same accused will amount to an improvement on the facts mentioned in the original complaint, hence, will be prohibited under Section 162 Cr.P.C. However, this rule will not apply to a counterclaim by the accused in the first complaint or on his behalf alleging a different version of the said incident. Thus, in case, there are rival versions in respect of the same episode, the investigating agency would take the same on two different FIRs and investigation can be carried under both of them by the same investigating agency and thus, filing an FIR pertaining to a counterclaim in respect of the same incident having a different version of events, is permissible."*

12. The Court considered other judgments as well in Paragraphs 17, 18 and 19 which are being quoted hereinbelow:-

*"17. In* ***Rameshchandra Nandlal Parikh v. State of Gujarat reported in (2006) 1 SCC 732****, this Court reconsidered the earlier judgment including T.T. Antony and held that in case the FIRs are not in respect of the same cognizable offence or the same occurrence giving rise to one or more cognizable offences nor are they alleged to have been committed in the course of the same transaction or the same occurrence as the one alleged in the first FIR, there is no prohibition in accepting the second FIR.*

*18. In* ***Nirmal Singh Kahlon v. State of Punjab reported in (2009) 1 SCC 441****, this Court considered a case where an FIR had already been lodged on 14-6-2002 in respect of the offences committed by certain individuals. Subsequently, the matter was handed over to the Central Bureau of Investigation (CBI), which during investigation collected huge amount of material and also recorded statements of large number of persons and CBI came to the conclusion that a scam was involved in the selection process of Panchayat Secretaries. The second FIR was lodged by CBI. This Court after appreciating the evidence, came to the conclusion that matter Investigated by CBI dealt with a larger conspiracy. Therefore, this investigation has been on a much wider canvass and held that second FIR was permissible and required to be investigated.*

*19. The Supreme Court held as under:*

*"67. The second FIR, in our opinion, would be maintainable not only because there were different versions but when new discovery is made on factual foundations. Discoveries may be made by the police authorities at a subsequent stage. Discovery about a larger conspiracy can also surface in another proceeding, as for*

*example, in a case of this nature. If the police authorities did not make a fair Investigation and left out conspiracy aspect of the matter from the purview of its investigation, in our opinion, as and when the same surfaced, it was open to the State and/or the High Court to direct Investigation in respect of an offence which is distinct and separate from the one for which the FIR had already been lodged."*

(emphasis supplied by us)

13. Thereafter, the Supreme Court examined the Appeal in the light of the settled legal propositions as mentioned in the cases cited hereinabove.

14. The Court also considered the question of tainted investigation and made certain observations with regard to the plea raised regarding malice in law and the duty of Investigating Agency and emphasized that where the Court comes to a conclusion that there was a serious irregularity in the investigation that had taken place, the Court may direct a further investigation under Section 173(8) Cr.PC, even transferring the investigation to an independent agency, rather than directing a reinvestigation. Several binding precedents were considered with regard to the Court's interference where desired in exceptional circumstances to prevent miscarriage of criminal justice and the direction which the High Court / Any Superior Court can give in such matters to ensure fair trial and fair investigation. The Court did not interfere in the order passed by the High Court but only modified it to the extent that the Charge-sheet in both the cases and any other consequent thereto were quashed and it observed that in case any of the accused could not get bail because of pendency of the Special Leave to Appeal before the Court, it would be open for him to apply bail or any other relief before the appropriate Forum.

15. The counsel for the petitioners has failed to point out as to how his case is covered with the facts as mentioned hereinabove with regard to Babubhai Vs. State of Gujarat as cited by the counsel for the petitioners.

16. Shri Alok Kirti Mishra, has also cited a judgment rendered in ***Amitbhai Anilchandra Shah Vs. Central Bureau of Investigation and Another reported in (2013) 6 SCC 348***, and has referred to Paragraph-37 thereof which is being quoted hereinbelow:-

*"37. This Court has consistently laid down the law on the issue interpreting the Code, that a second FIR in respect of an offence or different offences committed in the course of the same transaction is not only impermissible but it violates Article 21 of the Constitution. In T.T. Antony. this Court has categorically held that registration of second FIR (which is not ca cross-case) is violative of Article 21 of the Constitution. The following conclusion in paras 19, 20 and 27 of that judgment are relevant which read as under:*

*"19. The scheme of CrPC is that an officer in charge of a police station has to commence investigation as provided in Section 156 or 157 CrPC on the basis of entry of the first information report, on coming to know of the commission of a cognizable offence. On completion of investigation and on the basis of the evidence collected, he has to form an opinion under Section 169 or 170 CrPC, as the case may be, and forward his report to the Magistrate concerned under Section 173(2) CrPC. However, even after filing such a report, if he comes into possession*

*of further information or material, he need not register a fresh FIR; he is empowered to make further investigation, normally with the leave of the court, and where during further investigation he collects further evidence, oral or documentary, he is obliged to forward the same with one or more further reports; this is the import of sub-section (8) of Section 173 CrPC.*

*20. From the above discussion it follows that under the scheme of the provisions of Sections 154, 155, 156, 157, 162, 169, 170 and 173 CrPC only the earliest or the first information in regard to the commission of a cognizable offence satisfies the requirements of Section 154 CrPC. Thus there can be no second FIR and consequently there can be no fresh investigation on receipt of every subsequent information in respect of the same cognizable offence or the same occurrence or incident giving rise to one or more cognizable offences. On receipt of information about a cognizable offence or an incident giving rise to a cognizable offence or offences and on entering the FIR in the station house diary, the officer in charge of a police station has to investigate not merely the cognizable offence reported in the FIR but also other connected offences found have been committed in the course of the same transaction or the same occurrence and file one or more reports as provided in Section 173 CrPC.*

*27. A just balance between the fundamental rights of the citizens under Articles 19 and 21 of the Constitution and the expansive power of the police to investigate a cognizable offence has to be struck by the court. There cannot be any controversy that sub-section (8) of Section 173 CrPC empowers the police to make further investigation, obtain further evidence (both oral and documentary) and forward a further report or reports to the Magistrate. In Narang case it was, however, observed that it would be appropriate to conduct further investigation with the permission of the court. <u>However, the sweeping power of investigation does not warrant subjecting a citizen each time to fresh investigation by the police in respect of the same incident, giving rise to one or more cognizable offences, consequent upon filing of successive FIRs whether before or after filing the final report under Section 173(2) Cr.PC.</u> It would clearly be beyond the purview of Sections 154 and 156 Cr.PC, nay, a case of abuse of the statutory power of investigation in a given case. In our view a case of fresh investigation based on the second or successive FIRs, not being a counter-case, filed in connection with the same or connected cognizable offence alleged to have been committed in the course of the same transaction and in respect of which pursuant to the first FIR either investigation is under way or final report under Section 173(2) has been forwarded to the Magistrate, may be a fit case for exercise of power under Section 482 Cr.PC or under Articles 226/227 of the Constitution.*

*The abovereferred declaration of law by this Court has never been diluted in any subsequent judicial pronouncements even while carving out exceptions."*

(emphasis supplied by us)

17. The Court also referred to TT Antony (Supra), Upkar Singh Vs. Ved Prakash (Supra), Babubhai Vs. State of Gujarat (Supra) as well as judgment rendered in ***Chirra Shivraj Vs. State of Andhra Pradesh reported in (2010) 14 SCC 444, and C. Muniappan Vs. State of Tamilnadu reported in (2010) 9 SCC 567***, and the laying down of the "Consequence

test" i.e. if an offence forming part of the second FIR arises as a consequence of the offence alleged in the first FIR then the offences covered by both the FIRs are the same and, accordingly, the second FIR will be impermissible in law. In other words, the offences covered in both the FIRs shall have to be treated as part of the first FIR.

18. We have gone through the alleged first FIR regarding the same incident which was lodged by one Dinesh Kumar Pandey, the Station House Officer Incharge of Police Station Kotwali Nagar, District Bahraich i.e. F.I.R. No.0346 of 2024 lodged at 09:11 am on 15.10.2024 it relates to the incident that occurred at 07:00 pm on 13.10.2024 when the idols of Devi Durga were being taken for immersion after conclusion of Navratri celebrations and the said procession was attacked by members of a particular community as a result whereof one person was shot dead namely Ram Gopal Mishra which resulted in heavy stonepelting and communal disharmony. The procession which was taking the idols for immersion was stopped and some anti-social elements also incited the members of the general public to abuse and assault public servants /employees and prevent them from carrying out their public duties. The road was blockaded and stonepelting continued unabated also attack was made by Lathi/Danda near one T crossing by the name of Peepal Tiraha and Steelganj market. Reference was made to certain persons belonging to the other community whose names were also mentioned in the said FIR, whose shops were attacked and vandalized and one motorcycle was also set on fire. This FIR talks of some anti-social elements vandalizing public property as well as private property of the other community and creating an atmosphere of social disharmony. Reference was made to such unlawful activity being carried out in several neighbourhoods names of which have been given in the said FIR.

19. On the other hand, the F.I.R. that was lodged on 18.10.2024 at 05:11 pm registered as Case Crime No.0347 of 2024 by the Respondent no.4 under Sections 191(2), 191(3), 3(5), 109(1), 324(2), 351(3), 352 & 125 of the B.N.S. at Police Station Kotwali Nagar, District Bahraich, against seven named accused including the petitioners herein has made mention of a specific incident with regard to the dead body of one Ram Gopal Mishra being kept outside the gate of Bahraich Medical College and the crowd raising slogans and protesting the attempt being made by the District Administration and the Police Authorities as well as the CMO from taking the body for autopsy to the Mortuary. The seven named accused were part of a larger group of persons and mention has been made regarding the attempt being made by informant who is a public representative in trying to pacify the members of the crowd and in trying to explain to them the necessity of getting the post mortem done of the deceased-victim and also help being sought from the District Magistrate in this regard. Despite attempt being made by the District Magistrate and the sitting MLA to pacify the crowd, and to take the body of the deceased-victim to the Mortuary, the crowd continued stonepelting which resulted in the smashing of the wind screen of one Car registration number of which has been mentioned in the FIR and firing of one gun shot in the air. This incident happened in between 8:00 pm to 10:00 pm at night on 13.10.2024 and the informant has also referred to evidence being made available in CCTV footage if it is examined by the police during the investigation.

20. The initial FIR that was lodged on 15.10.2024 by the police official concerned related to a general information regarding the incident which happened during the immersion procession of Devi Durga idols where one person was shot as a result whereof crowd got angry and destroyed the shops of the other community through stone-pelting and setting them on fire whereas the FIR that was lodged on 18.10.2024 at 05:11 pm by the public representative, the sitting MLA of Mahasi Constituency with regard to the incident where the named accused alongwith others were holding Dharna Pradarshan with the body of the deceased-victim and not letting the District Administration and the Police Authorities from carrying out their public duties regarding the autopsy of the deceased-victim by taking his body to the mortuary for post mortem examination. There was firing of gun shot in the air also.

21. *Prima facie*, we do not find that the second FIR which was lodged on 18.10.2024 and which has been challenged in these petitions to be a part of the same transaction. It is related to a subsequent development and the Section of the B.N.S. invoked in the same are not identical and do not relate to the same incident or the same accused.

22. We, therefore, do not find any good ground to show interference, as prayed for, in these petitions, hence, they are **dismissed.**

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**(2024) 11 ILRA 397**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 07.11.2024**

**BEFORE**

**THE HON'BLE ASHUTOSH SRIVASTAVA, J.**

Matters Under Article 227 No. 1205 of 2024
(Civil)

**Usman ...Petitioner**
**Versus**
**Smt. Rajeshwari & Anr. ...Respondents**

**Counsel for the Petitioner:**
Sri Lalit Kumar

**Counsel for the Respondents:**
Sri Sanjay Kumar Dubey, Smt. Shreya Gupta

**Civil Law - U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (U.P. Act No. 13 of 1972) - Section 21(1)(a) – Bona fide need – Comparative hardship – Petition under Article 227 challenging concurrent findings of Prescribed Authority and Appellate Authority allowing landlord's application for release of shop for setting up chamber – Landlord was an advocate by profession – Tenant claimed shop was unsuitable and concealed facts regarding landlord's existing chamber – Both authorities below held landlord's need as genuine and bona fide – Tenant failed to deny specific averments in release application; adverse inference drawn – Order VIII Rule 5(1) CPC- Comparative hardship also decided against tenant as no alternative accommodation was explored.**

**Constitution of India, 1950 - Article 227 – *Scope and limitation* – Interference permissible only in cases of jurisdictional error, grave dereliction of duty, or manifest injustice – Reappreciation of evidence or correction of mere factual errors not permissible – Reaffirmed by catena of Supreme Court decisions- petition dismissed. (Paras 11, 14, 17, 18, 19, 20, 21 to 31 and 32)**

**HELD:**

In the opinion of the Court since the tenant/ petitioner has not specifically denied the averments in para 5 of the release application an adverse inference is liable to be drawn against him and the fact St.d in para 5 of the release application would be treated to have

been admitted. Order VIII Rule 5 (1) CPC provides that every allegation of fact in the plaint if not denied specifically in the written St.ment shall be taken to be admitted by the defendant. I am fortified by the view taken by the Apex Court in the case of Suresh Chandra Jain Vs Jai Krishna Goswamy & ors.reported in 1993 (2) ARC 484. (para 11)

The scope of judicial review in such matters where the orders of courts below are assailed before this Court in a writ petition under Article 226/227 of the Constitution is very limited. This power involves a duty on the High Court to keep the inferior courts and tribunals within the bounds of their authority and to see that they do what their duty requires and that they do it in a legal manner. But this power does not vest the High Court with any unlimited prerogative to correct all species of hardship or wrong decisions made within the limits of the jurisdiction of the Court or Tribunal. It must be restricted to cases of grave dereliction of duty and flagrant abuse of fundamental principle of law or justice, where grave injustice would be done unless the High Court interferes. (Para 14)

The above discussion leaves no scope for interference with the orders impugned in this writ petition. I have no doubt in holding that this petition lacks substance and is devoid of merits. (Para 32)

**Petition dismissed.** (E-14)

**List of Cases cited:**

1. Pawan Kumar Jain Vs Sushila Devi Jain & ors.reported in 2021 (1) ARC 742

2. Suresh Chandra Jain Vs Jai Krishna Goswamy & ors.reported in 1993 (2) ARC 484

3. D. N. Banerji Vs P. R. Mukherjee 1953 SC 58

4. Waryam Singh & anr.Vs Amarnath & anr.AIR 1954 SC 215

5. Nibaran Chandra Bag Vs Mahendra Nath Ghughu, AIR 1963 SC 1895

6. Rukmanand Bairoliya Vs the St. of Bihar & ors., AIR 1971 SC 746

7. Gujarat Steel Tubes Ltd. Vs Gujarat Steel Tubes Mazdoor Sabha & ors., AIR 1980 SC 1896

8. Laxmikant R. Bhojwani Vs Pratapsing Mohansingh Singh Pardeshi, (1995) 6 SCC 576

9. Reliance Industries Ltd. Vs Pravinbhai Jasbhai Patel & ors., (1997) 7 SCC 300

10. M/s. Pepsi Food Ltd. & anr.Vs Sub-Judicial Magistrate & ors., (1998) 5 SCC 749

11. Virendra Kashinath Ravat & ors.Vs Vinayak N. Joshi & ors.(1999) 1 SCC 47

12. Rena Drego Vs Lalchand Soni & ors., (1998) 3 SCC 341

13. Chandra Bhushan Vs Beni Prasad & ors., (1999) 1 SCC 70

14. Savitrabai Bhausaheb Kevate & ors.Vs Raichand Dhanraj Lunja, (1999) 2 SCC 171

15. Savita Chemical (P) Ltd. Vs Dyes & Chemical Workers' Union & anr.,(1999) 2 SCC 143

16. U.O.I. & ors.Vs Himmat Singh Chahar, (1999) 4 SCC 521

17. Ajaib Singh Vs Sirhind Co-opeative Marketing cum Processing Service Society Ltd., (1999) 6 SCC 82

18. Mohan Amba Prasad Agnihotri Vs Bhaskar Balwant Aheer, AIR 2000 SC 931

19. Indian Overseas Bank Vs Indian Overseas Bank Staff Canteen Workers' Union (2000) 4 SCC 245

20. U.O.I. Vs Rajendra Prabhu, (2001) 4 SCC 472

21. Maharashtra Vs Milind & ors., (2001) 1 SCC 4

22. Extrella Rubber Vs Dass ESt. (P) Ltd., (2001) 8 SCC 97

23. Omeph Mathai & ors.Vs M. Abdul Khader, (2002) 1 SCC 319

24. Surya Dev Rai Vs Ram Chander Rai & ors.(2003) 6 SCC 675

25. Jasbir Singh Vs St. of Pun. (2006) 8 SCC 294

26. Shalini Shyam Shetty & anr.Vs Rajendra Shankar Patil (2010) 8 SCC 329

27. Kokkanda B. Poondacha & ors.Vs K.D. Ganapathi & anr.AIR 2011 SC 1353

28. Bandaru Satyanarayana Vs Imandi Anasuya (2011) 12 SCC 650

29. Abdul Razak (D) through Lrs. & ors.Vs Mangesh Rajaram Wagle & ors.(2010) 2 SCC 432

30. T.G.N. Kumar Vs St. of Kerala & ors.(2011) 2 SCC 772

31. Commandant, 22nd Battalion, CRPF & ors.Vs Surinder Kumar (2011) 10 SCC 244

32. U.O.I. Vs R.K. Sharma (2001) 9 SCC 592

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

1. Heard Sri Lalit Kumar, learned counsel for the tenant/petitioner and Smt. Shreya Gupta learned counsel appearing for the landlord/respondent.

2. This petition under Article 227 of the Constitution of India at the instance of the tenant has been filed questioning the judgment and order dated 09.11.2023 passed by the Additional District Judge, Court No. 1, Hathras in UPUB Appeal No. 01 of 2021 whereby and whereunder the Appeal of the Tenant/ petitioner has been rejected and the judgment and order of the Prescribed Authority dated 06.04.2021 allowing the application of the respondents/ landlords under Section 21 (1) (a) of the UP Act No. 13 of 1972 has been upheld.

3. The facts necessary for adjudication of the lis between the parties briefly stated are that the landlord/ respondents instituted a P.A. Case being P.A. Case No. 13 of 2014 under Section 21 (1) (a) of the U.P. Act No. 13 of 1972 setting up a bona fide need for the shop situate in Gali Kaunjdan Punjabi Market, Hathras under the tenancy of the petitioner. It was stated that the release was sought on the ground that the respondent no. 2 is an Advocate by profession and requires the shop for setting up his chamber. The tenant has no requirement of the shop and is only occupying it to get Pagri. He carries on his business in Mathura. The release application was contested by the petitioner denying the plaint case stating that the shop is very small measuring 8x10 Feet and not at all suitable for establishing an Advocate Chamber. It was also stated that the tenant would suffer greater hardship in comparison to the landlord and prayed that the release application be dismissed.

4. The Prescribed Authority/ Civil Judge, Hathras after due appreciation of the materials on record allowed the release application vide order dated 06.04.2021 holding the need of the landlord/ respondents as bona fide and genuine and the question of comparative hardship was also decided in favour of the landlord/ respondents and against the petitioner. The Appeal preferred by the petitioner against the order of the Prescribed Authority being P.A. Appeal No. 1 of 2021 was also dismissed vide judgment and order dated 09.11.2023. Both the orders have been assailed in this petition.

5. Learned counsel for the tenant/petitioner has assailed the impugned orders on the ground that the learned Prescribed Authority without considering and appreciating the oral and documentary evidence on record upheld the need of the landlord/ respondents holding it to be bona

fide. Placing reliance upon a decision of this Court in the case of ***Pawan Kumar Jain vs. Sushila Devi Jain and 3 others reported in 2021 (1) ARC 742,*** learned counsel for the tenant/ petitioner submits that the landlord is required to first prove and establish his bona fide need for the accommodation in dispute under the tenancy of the tenant. Elaborating his arguments further learned counsel for the tenant/ petitioner contends that the need pleaded by the landlord should be natural, real sincere and honest and should not be merely a pretence or pretext to evict a tenant. A mere statement or a pleadings on the part of the landlord that he bona fidely required the said building for a purpose specified in the pleadings is not sufficient but the requirement has to be proved by the landlord by bringing sufficient evidence before the Court. The burden is on the landlord to establish his case affirmatively. Learned counsel for the tenant/ petitioner has invited the attention of this Court to the objections filed by the tenant/ petitioner to the release application under Section 21 (I) (a) to demonstrate that the landlord/ respondent no. 2 for quite some time has been practising law and has a chamber existing in which he is carrying of his practice as an Advocate. This fact has deliberately been concealed. The need for the accommodation under the tenancy of the petitioner is thus not bona fide. Besides by way of an evidence affidavit/ paper no. 32 C has established the fact that the landlord/ respondent no. 2 has been practising as an Advocate for the last 2 years from his chamber set up in his house. In his own affidavit the petitioner has stated that the landlord/ respondents have already obtained possession of a shop under the tenancy of one Dore Lal which can be utilized for setting up a chamber.

6. Learned counsel for the tenant/ petitioner has further argued that the learned Prescribed Authority while dealing with the issue of bona fide need ventured into the aspect that the tenant/ petitioner had not searched for any alternative accommodation after filing of the release application and proceeded to hold that the need of the landlord/ respondent was bona fide and genuine. It is submitted that the approach of the learned Prescribed Authority was patently erroneous inasmuch as the consideration for searching out alternate accommodation would be relevant for the purposes of comparative hardship and not for determining the bona fide need.

7. It has also been argued that the Appellate Authority manifestly erred in rejecting the Appeal and upholding the order of the Prescribed Authority. It is submitted that the Appellate Authority is required to record, the findings dealing with all issues as well as fact and with the oral and documentary evidence led by the parties. It is argued that the findings of the Appellate Authority falls short of the requirements under the law and as such is liable to be set aside.

8. The petition has been opposed by Ms. Shreya Gupta, learned counsel, who has put in appearance on behalf of the landlord/respondents. Ms. Shreya Gupta, learned counsel submits that the petition is concluded by findings of fact in as much as both the Prescribed Authority and the Appellate Authority have held the need set up by the landlord/ respondents to be bona fide and genuine. The comparative hardship has also been decided in favour of the landlord/ respondents and against the tenant/ petitioner. No interference is warranted by this Hon'ble Court and the

petition is liable to be dismissed at the threshold.

9. I have heard the leaned counsels for the parties and have perused the records.

10. A perusal of he Release application under Section 21 (I) (a) of the UP Act No. 13 of 1972 reveals that the release was sought setting up bona fide needs for the shop under the tenancy of the tenant/ petitioner for starting a lawyer chamber for the landlord respondent no. 2 who admittedly was a practising lawyer. It was also stated in the release application in para 5 thereof that the tenant/ petitioner is not in need of the accommodation and has retained the possession only for the purposes of Pagri and carries on his business in Mathura. A perusal of the written statement of the petitioner filed to the release application the court finds that no reply has been given to the averments made in para 5 of the release application. The factum that the petitioner does not require the accommodation and that he carried on business in Mathura has not been controverted.

11. In the opinion of the Court since the tenant/ petitioner has not specifically denied the averments in para 5 of the release application an adverse inference is liable to be drawn against him and the fact stated in para 5 of the release application would be treated to have been admitted. Order VIII Rule 5 (1) CPC provides that every allegation of fact in the plaint if not denied specifically in the written statement shall be taken to be admitted by the defendant. I am fortified by the view taken by the Apex Court in the case of ***Suresh Chandra Jain vs. Jai Krishna Goswamy and others reported in 1993 (2) ARC 484.***

12. The records further reveal that the release application was resisted by stating that the landlord/ respondent no. 2 has concealed the fact that he is already in possession of a chamber which he is utilising in his residential house and as such the need set up is not genuine. However, the learned Prescribed Authority while dealing with the issue of bona fide need has found that the landlord/ respondents established their need for the shop in dispute by oral and documentary evidence of Dinesh Kumar Bansal (Landlord/ Respondent no. 2) as P.W.-1 , Ramji Lal Verma as P.W.-2, and Ghanshyam Das as P.W.-3. The tenant petitioner filed his own evidence affidavit and got examined Mahendra Singh as D.W.-3. The Prescribed Authority held that the tenant/ petitioner could not establish the fact that the landlord respondent no. 2 has already established his lawyer chamber. The Prescribed Authority also found that the tenant/ petitioner could not dictate how the landlord respondents may utilize certain property available with them to satisfy their need. It also found that the tenant petitioner had not made efforts to search out alternate accommodation after filing of the release application and accordingly decided the question of comparative hardship against the tenant/ petitioner. The release application was accordingly allowed.

13. In Appeal, the Court finds that the question of bona fide need of the landlord/respondents have been upheld. The question of comparative hardship has also been decided against the tenant/ petitioner on the ground that the tenant petitioner did not search for any alternate accommodation. Several authorities have been taken note of by the Appellate Authority while upholding the findings of the Prescribed Authority. The Court does

not deem it appropriate to burden this judgment by reiterating all the decisions relied upon suffice is to mention that having gone through both the judgments at length, I do not find any manifest error therein warranting interference in exercise of jurisdiction under Article 227 of the Constitution of India.

14. The scope of judicial review in such matters where the orders of courts below are assailed before this Court in a writ petition under Article 226/227 of the Constitution is very limited. This power involves a duty on the High Court to keep the inferior courts and tribunals within the bounds of their authority and to see that they do what their duty requires and that they do it in a legal manner. But this power does not vest the High Court with any unlimited prerogative to correct all species of hardship or wrong decisions made within the limits of the jurisdiction of the Court or Tribunal. It must be restricted to cases of grave dereliction of duty and flagrant abuse of fundamental principle of law or justice, where grave injustice would be done unless the High Court interferes.

15. In ***D. N. Banerji Vs. P. R. Mukherjee 1953 SC 58*** the Court said:

"Unless there was any grave miscarriage of justice or flagrant violation of law calling for intervention, it is not for the High Court under articles 226 and 227 of the Constitution to interfere."

16. A Constitution Bench of Apex Court examined the scope of Article 227 of the Constitution in ***Waryam Singh and another Vs. Amarnath and another AIR 1954 SC 215*** and made following observations at p. 571 :

"This power of superintendence conferred by article 227 is, as pointed out by Harries, C.J. in Dalmia Jain Airways Ltd. Vs. Sukumar Mukherjee AIR 1951 Cal. 193, to be exercised most sparingly and only in appropriate cases in order to keep the Subordinate Courts within the bounds of their authority and not for correcting mere errors".

17. In ***Mohd. Yunus v. Mohd. Mustaqim and Ors. AIR 1984 SC 38*** the Apex Court held that this Court has very limited scope under Article 227 of the Constitution and even the errors of law cannot be corrected in exercise of power of judicial review under Article 227 of the Constitution. The power can be used sparingly when it comes to the conclusion that the Authority/Tribunal has exceeded its jurisdiction or proceeded under erroneous presumption of jurisdiction. The High Court cannot assume unlimited prerogative to correct all species of hardship or wrong decision. For interference, there must be a case of flagrant abuse of fundamental principles of law or where order of the Tribunal, etc. has resulted in grave injustice.

18. For interference under Article 227, the finding of facts recorded by the Authority should be found to be perverse or patently erroneous and de hors the factual and legal position on record. ***(See: Nibaran Chandra Bag Vs. Mahendra Nath Ghughu, AIR 1963 SC 1895; Rukmanand Bairoliya Vs. the State of Bihar & ors., AIR 1971 SC 746; Gujarat Steel Tubes Ltd. Vs. Gujarat Steel Tubes Mazdoor Sabha & ors., AIR 1980 SC 1896; Laxmikant R. Bhojwani Vs. Pratapsing Mohansingh Singh Pardeshi, (1995) 6 SCC 576; Reliance Industries Ltd. Vs. Pravinbhai Jasbhai Patel & ors., (1997) 7 SCC 300; M/s. Pepsi Food Ltd. & Anr. Vs. Sub-Judicial Magistrate & ors., (1998) 5***

***SCC 749; and Virendra Kashinath Ravat & ors. Vs. Vinayak N. Joshi & ors. (1999) 1 SCC 47).***

19. It is well settled that power under Article 227 is of the judicial superintendence which cannot be used to up-set conclusions of facts, howsoever erroneous those may be, unless such conclusions are so perverse or so unreasonable that no Court could ever have reached them. ***(See: Rena Drego Vs. Lalchand Soni & ors., (1998) 3 SCC 341; Chandra Bhushan Vs. Beni Prasad & ors., (1999) 1 SCC 70; Savitrabai Bhausaheb Kevate & ors. Vs. Raichand Dhanraj Lunja, (1999) 2 SCC 171; and Savita Chemical (P) Ltd. Vs. Dyes & Chemical Workers' Union & Anr.,(1999) 2 SCC 143).***

20. Power under Article 227 of the Constitution is not in the nature of power of appellate authority enabling re-appreciation of evidence. It should not alter the conclusion reached by the Competent Statutory Authority merely on the ground of insufficiency of evidence***. (See: Union of India & ors. Vs. Himmat Singh Chahar, (1999) 4 SCC 521).***

21. In ***Ajaib Singh Vs. Sirhind Co-opeative Marketing cum Processing Service Society Ltd., (1999) 6 SCC 82***, the Hon'ble Apex Court has held that there is no justification for the High Court to substitute its view for the opinion of the Authorities/ Courts below as the same is not permissible in proceedings under Articles 226/227 of the Constitution.

22. In ***Mohan Amba Prasad Agnihotri Vs. Bhaskar Balwant Aheer, AIR 2000 SC 931***, the Hon'ble Supreme Court held that jurisdiction of High Court under Article 227 of the Constitution is not appealable but supervisory. Therefore, it cannot interfere with the findings of fact recorded by Courts below unless there is no evidence to support findings or the findings are totally perverse.

23. In ***Indian Overseas Bank Vs. Indian Overseas Bank Staff Canteen Workers' Union (2000) 4 SCC 245***, the Court observed that it is impermissible for the Writ Court to reappreciate evidence liberally and drawing conclusions on its own on pure questions of fact for the reason that it is not exercising appellate jurisdiction over the awards passed by Tribunal. The findings of fact recorded by the fact finding authority duly constituted for the purpose ordinarily should be considered to have become final. The same cannot be disturbed for the mere reason of having based on materials or evidence not sufficient or credible in the opinion of Writ Court to warrant those findings. At any rate, as long as they are based upon some material which are relevant for the purpose no interference is called for. Even on the ground that there is yet another view which can reasonably and possibly be taken the High Court can not interfere.

24. In ***Union of India Vs. Rajendra Prabhu, (2001) 4 SCC 472,*** the Hon'ble Apex Court held that the High Court, in exercise of its extraordinary powers under Article 227 of the Constitution, cannot re-appreciate the evidence nor it can substitute its subjective opinion in place of the findings of Authorities below.

25. Similar view has been reiterated in ***State of Maharashtra Vs. Milind & ors., (2001) 1 SCC 4; Extrella Rubber Vs. Dass Estate (P) Ltd., (2001) 8 SCC 97***; and Omeph Mathai & ors. Vs. M. Abdul Khader, (2002) 1 SCC 319.

26. In ***Surya Dev Rai Vs. Ram Chander Rai and others (2003) 6 SCC 675,*** it was held that in exercise of supervisory power under Article 227, High Court can correct errors of jurisdiction committed by subordinate Courts. It also held that when subordinate court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or jurisdiction though available is being exercised in a manner not permitted by law and failure of justice or grave injustice has occasioned, the Court may step in to exercise its supervisory jurisdiction. However, it also said that be it a writ of certiorari or exercise of supervisory jurisdiction, none is available to correct mere errors of fact or law unless error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or disregard of the provisions of law; or, a grave injustice or gross failure of justice has occasioned thereby.

27. In ***Jasbir Singh Vs. State of Punjab (2006 ) 8 SCC 294***, the Court said:

"...while invoking the provisions of Article 227 of the Constitution, it is provided that the High Court would exercise such powers most sparingly and only in appropriate cases in order to keep the subordinate courts within the bounds of their authority. The power of superintendence exercised over the subordinate courts and tribunals does not imply that the High Court can intervene in the judicial functions of the lower judiciary. The independence of the subordinate courts in the discharge of their judicial functions is of paramount importance, just as the independence of the superior courts in the discharge of their judicial functions."

28. In ***Shalini Shyam Shetty and another Vs. Rajendra Shankar Patil (2010) 8 SCC 329,*** the Court said that power of interference under Article 227 is to be kept to the minimum to ensure that the wheel of justice does not come to a halt and the fountain of justice remains pure and unpolluted in order to maintain public confidence in the functioning of the tribunals and Courts subordinate to High Court. The above authority has been cited and followed in ***Kokkanda B. Poondacha and others Vs. K.D. Ganapathi and another AIR 2011 SC 1353 and Bandaru Satyanarayana Vs. Imandi Anasuya (2011) 12 SCC 650.***

29. In ***Abdul Razak (D) through Lrs. & others Vs. Mangesh Rajaram Wagle and others (2010) 2 SCC 432,*** Apex Court reminded that while exercising jurisdiction under Article 226 or 227, High Courts should not act as if they are exercising an appellate jurisdiction.

30. In ***T.G.N. Kumar Vs. State of Kerala and others (2011) 2 SCC 772,*** the Court said that power of superintendence conferred on the High Court under Article 227 of the Constitution of India is both administrative and judicial, but such power is to be exercised sparingly and only in appropriate cases in order to keep the subordinate courts within the bounds of their authority.

31. In ***Commandant, 22nd Battalion, CRPF and others Vs. Surinder Kumar (2011) 10 SCC 244***, Apex Court referring to its earlier decision in ***Union of India Vs. R.K. Sharma (2001) 9 SCC 592*** observed that only in an extreme case, where on the face of it there is perversity or irrationality, there can be judicial review under Articles 226 or 227.

32. The above discussion leaves no scope for interference with the orders impugned in this writ petition. I have no doubt in holding that this petition lacks substance and is devoid of merits.

33. ***Dismissed.***

34. Interim order, if any, shall stand vacated.

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**(2024) 11 ILRA 405**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 12.11.2024**

**BEFORE**

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

Matters Under Article 227 No. 9641 of 2023 (Criminal)

**Km. Gunjan (minor) ...Petitioner**
**Versus**
**Ram Ratan ...Respondent**

**Counsel for the Petitioner:**
Sri Anup Kumar Singh, Sri Rajesh Kumar Gautam

**Counsel for the Respondent:**
Sri Ajay Dubey, Sri Shambhu Mani Tripathi, Sri Apul Mishra

**Motor Vehicles Act, 1988 — Section 207 - Central Motor Vehicles Rules, 1989 — Rule 56(2) - Form 31 — Custody of seized vehicle — Minor petitioner sole legal heir of registered owner — Notary sale deed relied on by respondent held untrustworthy — Succession certificate and RTO authorization in favour of minor petitioner valid — Held, custody of vehicle to be restored to minor petitioner — litigation should not be prolonged to detriment of minor's rights- Revisional order set aside-Petition allowed.**

**HELD:**

Considering the aforesaid facts and circumstances of the case and the submissions advanced by the parties, the order dated 25.8.2023 passed by learned Additional Session Judge, Court No. 29, Agra passed in Criminal Revision No. 179 of 2023 (Ram Ratan Vs St. of U.P. & anr.) is hereby set-aside with the direction to the Court concerned to handover the custody of the vehicle immediately to the petitioner Gunjan (minor) through her legal guardian Kishan Pal Singh and settle the dispute at the earliest.

**Petition allowed.** (E-14)

(Delivered by Hon'ble Ms. Nand Prabha Shukla, J.)

1. Heard Sri Rajesh Kumar Gautam, learned counsel for the petitioner, Sri Shambhu Mani Tripathi, Advocate holding brief of Sri Ajay Dubey, learned counsel for the respondent no.3, Sri Nand Lal, learned A.G.A. for the State and perused the record.

2. The present writ petition under Article 227 of the Constitution of India has been filed with a prayer to set-aside the order dated 25.08.2023 passed by learned Additional Session Judge, Court No. 29, Agra passed in Criminal Revision No. 179 of 2023 (Ram Ratan vs. State of U.P. and another) and also direct the learned Trial Court to release the aforesaid vehicle in favour of the petitioner.

3. The instant writ petition has been preferred by the petitioner Km. Gunjan (minor) aged about 8 years through her legal, i.e., her maternal grandfather Sri Kishan Pal Singh.

4. The matter in brief is that the father of the petitioner namely Late Manvendra Singh purchased a Bolero Vehicle on 8.4.2019 which was registered through

Certificate of Registration dated 1.8.2019 before the Transport Regional Officer, Agra as U.P.80 FC 3477. Unfortunately, the father of the minor petitioner died on 03.05.2019. Subsequently, her mother also died on 17.11.2019. In the meantime, the respondent no. 3 Ram Ratan who served as a driver of her father wanted to grab the vehicle and got a forged Notary Sale Deed dated 25.03.2019 prepared in his favour and moved an application dated 23.9.2019 for transfer of ownership. After having knowledge about the same, the maternal grandfather of the petitioner endeavoured to get back the vehicle from respondent no. 3 Ram Ratan but was denied.

5. It has been submitted by learned counsel for the petitioner that the maternal grandfather (Kishan Pal Singh) moved an application before the Regional Transport Officer, Agra to transfer the aforesaid vehicle in favour of the petitioner, the sole legal heir of her deceased parents. A report dated 27.12.2021 was sought from Lekhpal wherein the petitioner Km. Gunjan (minor) was shown to be the sole legal heir of the deceased Manvendra who was the owner of the vehicle. Accordingly, the Regional Transport Officer, Agra, gave temporary authorization on 5.7.2023 of the said vehicle to the petitioner under the guardianship of her maternal grandfather for a certain period.

6. In the meanwhile, on 31.05.2022, the Barhan Police seized the said vehicle U.P. 80 FC 3477 under Section 207 of Motor Vehicles Act and was challaned vide Challan Order No. 91012220531184219 in the name of Ram Ratan as at the time of seizure, the vehicle was in the custody of respondent no. 3 Ram Ratan. An application was moved by the petitioner through her guardian Kishan Pal Singh for the release of the aforesaid vehicle as she was the registered owner. The said release application was however rejected on 17.6.2022.

7. Aggrieved by the said order, a Revision No. 397 of 2022 was filed before the District Judge, Agra wherein Ram Ratan was directed to be impleaded as a necessary party and the said revision was partly allowed directing the Court concerned to dispose of the matter after giving opportunity of hearing to both the parties. Both the parties appeared before the Trial Court and on the basis of records available the order dated 9.2.2023 was passed.

8. During the pendency of the criminal revision, the R.T.O. Agra granted temporary authorization of the vehicle to the minor petitioner Gunjan. Ram Ratan raised an objection that the vehicle has been transferred on the basis of incorrect facts and real facts were suppressed before the Transport Officer, Agra. Accordingly, the said transfer of the vehicle in favour of the petitioner was black listed.

9. The main submission of the learned counsel for the petitioner is that the order dated 25.08.2023 passed by the learned Additional Session Judge, Court No. 29, Agra is illegal and is not sustainable as the petitioner being the sole legal heir of the deceased Manvendra Singh, was the rightful owner of the vehicle.

10. It has also been asserted that the R.T.O., Agra had already granted temporarily authorization of registration certificate in favour of the petitioner Km. Gunjan (minor), Care Taker Kishan Pal Singh on 5.7.2023 for a certain period.

11. Per contra, learned counsel for the respondent no. 2 argued that though the

father of the petitioner Late Manvendra Singh was the registered owner of the vehicle but later it was purchased by Ram Ratan through a Sale Deed dated 25.03.2019. It was asserted that the deceased Manvendra during his lifetime had sold the vehicle to Ram Ratan on 25.03.2019 as the debt was due to be paid to the financer, but, the title of the vehicle could not be transferred in his favour. A Notary Sale Deed dated 25.03.2019 was executed between Manvendra Singh and Ram Ratan and Rs. 7 lakh was stated to have been paid to Manvendra Singh and the balance amount was to be paid by Ram Ratan. After the death of Manvendra Singh his in-laws mounted pressure upon Ram Ratan to return the vehicle and accordingly, Rs. 1,80,000/- was paid to Kishan Pal, the maternal grandfather of the petitioner.

12. Affidavit of the brother of the deceased Ravendra Singh and sister of the deceased Smt. Kaushalya have also been produced indicating that the said vehicle was sold out to Ram Ratan on 25.03.2019.

13. Further it was stated that the said vehicle was purchased by Sale Deed dated 25.03.2019 and had submitted the Transfer Form No. 30(2). R.T.O., Agra and had also paid the loan installments. He stated that he regularly paid the Toll Plaza through his accounts. Even by order dated 22.9.2023 vide Challan No. UP 91012220531184219 under Section 207 of Motor Vehicles Act, the vehicle was released in his favour.

14. The Revisional Court had thus observed that as the transfer application was pending decision before the Regional Transport Officer, Agra and as the ownership and title of the vehicle was not confirmed and no document claiming the ownership of the vehicle was produced, therefore, the custody of the vehicle was rightly given to Ram Ratan. Thus, the order dated 09.02.2023 was quashed by the Revisional Court directing the Trial Court to give the custody of the vehicle to Ram Ratan.

15. Having heard learned counsel for the parties and from the perusal of the record, it transpires that the petitioner Km. Gunjan (minor) aged about 8 years is the sole legal heir of the deceased Manvendra Singh who was the registered owner of the said vehicle. After the death of her father Manvendra on 03.05.2019 and mother Smt Sunita Kumari on 17.11.2019, the petitioner Km. Gunjan (minor) was their sole legal heir. The District Magistrate, Agra had issued a Succession Certificate No. 4740/Judicial Assistant -3 dated 26.02.2022 declaring the petitioner Km. Gunjan (minor) having date of birth 18.1.2015 as the sole legal heir.

16. On 27.05.2023 an application was moved by the petitioner through Care Taker Kishan Pal Singh for transfer of the vehicle under Rule 56 (2) of the Central Motor Vehicles Act, 1989, Financer through Form-31 had endorsed in favour of guardian. The then Assistant Regional Transport Officer, Agra vide order dated 30.05.2023 has ordered to transfer the vehicle in favour of the petitioner. Accordingly, the petitioner being legal heir of her deceased father, is the rightful owner of the said vehicle.

17. The alleged Sale Deed dated 25.03.2019 is a forged Notary Affidavit and is not a registered sale deed and was executed much prior to the date when the father of the petitioner purchased his Bolero vehicle,i.e. on 8.4.2019.

18. Considering the aforesaid facts and circumstances of the case and the submissions advanced by the parties, the

order dated 25.8.2023 passed by learned Additional Session Judge, Court No. 29, Agra passed in Criminal Revision No. 179 of 2023 (Ram Ratan vs. State of U.P. and another) is hereby set-aside with the direction to the Court concerned to handover the custody of the vehicle immediately to the petitioner Gunjan (minor) through her legal guardian Kishan Pal Singh and settle the dispute at the earliest.

19. It is also made clear that the matter has not being remitted back to the Court concerned as it shall unnecessarily prolong the litigation and the minor petitioner Km. Gunjan shall be unnecessarily harassed.

20. With the aforesaid directions/observations, the present Writ Petition is **disposed of.**

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**(2024) 11 ILRA 408**
**ORIGINAL JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 12.11.2024**

**BEFORE**

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

Application U/S 482. No. 25510 of 2024

**M/s Kewal Dairy ...Applicant**
**Versus**
**State of U.P. & Anr. ...Opposite Parties**

**Counsel for the Applicant:**
Bipin Kumar, Mohd, Naushad Siddiqui

**Counsel for the Opposite Parties:**
G.A.

**Criminal law- Criminal Procedure Code, 1973 -Section 482- Food Safety and Standards Act, 2006 — Sections 51, 59(i), 77 & 89 — Limitation for prosecution — Cognizance beyond one year — Effect of approval under Section 77 — Commissioner of Food Safety may extend limitation up to three years by recording reasons — Overriding effect of the Act under Section 89 — Section 468 CrPC not applicable — Cognizance rightly taken — application dismissed. (Paras 9 to 12, 15, and 16)**

**HELD:**
Ratio of St. of Rajasthan Vs Sanjay Kumar (supra) is also applicable in the Act, 2006 because, at the time of collection of a sample of food, no offence can be said to be committed as there is no prohibition to sell food which is not prohibited. It is only when Food Analyst Report received about unfit/unsafe food, offence can be said to be committed. In case of sell of unsafe or sub-standard milk, the date of commission of offence would be the date when the report of Food Analyst is received about its quality. (Para 9)

Thus applying the above Principle of Law in the present case, date of commission of offence would be 10.12.2017. Thereafter application for seeking approval was submitted by the Food Safety Officer on 14.05.2018 and approval under Section 77 of the Act, 2006 was granted on 20.06.2019. Therefore period between 14.05.2018 to 20.06.2019 would be excluded because of Section 470(3) Cr.P.C., as Section 470(3) Cr.P.C. provides exclusion of time taken by Sanctioning Authority in computation of limitation. Therefore complaint filed on 04.07.2019 was well within one year. (Para 10)

As per the law laid down in Sarah Mathew Vs Institute of Cardio Vascular Diseases & ors.; (2014) 2 SCC 62, the date of cognizance would be the date when the complaint is filed. (Para 11)

So far as the contention of counsel for the applicant that the offence is punishable for one year and because of Section 468 Cr.P.C., the cognizance cannot be taken after one year is concerned, is incorrect because as per Section 77 of the Act, 2006 prosecution even after one year can be approved by the Commissioner, Food Safety and the same has already been approved by the Commissioner by order dated

20.06.2019. The specific provision of extension of limitation provided under Section 77 of the Act, 2006 will prevail over Section 468 Cr.P.C. because of Section 89 of the Act, 2006. (Para 15)

From the above observation in the judgement of Ram Nath's case (supra), it is clear that the overriding effect of the FSS Act is not confined to only food-related laws but also other Laws including Cr.P.C. (Para 17)

**Application dismissed.** (E-14)

**List of Cases cited:**

1. Ashok Kumar Pal Vs St. of U.P. and other (Application U/S 482 No.1700 of 2024)

2. St. of Rajasthan Vs Sanjay Kumar & ors.; (1998) 5 SCC 82

3. Sarah Mathew Vs Institute of Cardio Vascular Diseases & ors.; (2014) 2 SCC 62

4. Ram Nath Vs St. of U.P. & ors.; (2024) 3 SCC 502

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

1. Heard Mohd. Naushad Siddiqui, learned counsel for the applicant, Sri Pankaj Saxena, learned A.G.A for the State and perused the record.

2. The instant application under Section 482 Cr.P.C. has been filed for quashing the order dated 27.06.2024 passed by Metropolitan Magistrate-1st, Kanpur Nagar as well as entire proceeding of Complaint Case No.18674 of 2019, under Section 51 and 59(i) of Food Safety and Standard Act, 2006, Police Station- Nazirabad, District Kanpur Nagar pending in the court of Metropolitan Magistrate-1st, Kanpur Nagar.

3. Facts giving rise to the present case are that the sample of milk was collected on 24.11.2017 by the Food Safety Officer from the premises of applicant thereafter the sample of milk was sent to the Food Analyst, Regional Food Laboratory Medical College Campus, Meerut for analysis. Thereafter a report from a food analyst was received on 10.12.2017 showing milk was of sub-standard. Subsequently, notice was issued to the applicant, who filed the appeal before the designated officer against the report of the food analyst which was allowed and the sample was again sent for fresh analysis. Thereafter fresh report was received from the food analyst on 25.04.2018 again showing that the milk was sub-standard and also unsafe. Thereafter Food Safety Officer sent an application to the Commissioner, Food Safety through designated officer on 14.05.2018 to get approval for prosecution under Section 77 of Act, 2006. The Commissioner, Food Safety vide order dated 20.06.2019 granted approval for the prosecution of applicant despite expiry of period of one year from the date of commission of offence, thereafter complaint was filed on 04.07.2019.

4. Contention of learned counsel for the applicant is that the impugned proceeding is barred by limitation and the court below while rejecting his application failed to consider this aspect. It is further submitted that in the present case, the sample was collected on 24.11.2017 but the complaint was filed on 04.07.2019 which is after more than one year. Therefore, in view of Section 468 Cr.P.C. the court is barred from taking cognizance. Alternatively, counsel for the applicant also submitted that even it is accepted that in view of Section 77 of Food Safety and Standard Act, 2006 *(hereinafter referred to as the 'Act, 2006'),* the Commissioner of Food Safety can extend the period for

taking cognizance from one year to three years from the date of commission of an offence but the reason must be recorded but the Commissioner while extending the period of limitation under Section 77 of the Act, 2006 has not recorded reason. Learned counsel for the applicant lastly submitted that the sample was collected from the dairy of the applicant which was sub-standard, therefore, proceeding can be initiated only under Section 51 and not under Section 59(i) of the Act, 2006. It is submitted that being the time barred, the impugned complaint as well as impugned order deserves to be quashed.

5. In support of his contention, learned counsel for the applicant has also relied upon the judgement of this Court in the case of **Ashok Kumar Pal vs State of U.P. and other (Application U/S 482 No.1700 of 2024)** wherein this Court observed that cognizance can be taken by the court under the Act, 2006, after approval under Section 77 of the Act, 2006, up to the period of three years from the date of taking the sample.

6. Per contra, learned AGA has submitted that after the enforcement of Food Safety and Standard Act, 2006, a special provision regarding taking cognizance under the Act, 2006 has been provided under Section 77 of the Act, 2006 which provides that the court will not take cognizance of the offence under this Act after the expiry of the period of one year from the date of commission of offence but for reasons to be recorded by the Commissioner of Food Safety the aforesaid period can be extended up to three years. In such cases when the specific provision is there, then Section 468 Cr.P.C. will not be applicable because Section 89 of Act, 2006 specifically provides that this Act will override all other Acts.

7. After considering the submissions of learned counsel for the parties and on a perusal of the record, the question arises, what is the date of commission of offence to decide whether cognizance on complaint is barred by limitation. In support of his contention counsel for the applicant relied upon the earlier decision of this Court in the case of **Ashok Kumar Pal (supra)** in which it is held that date of commission of offence in the Act, 2006 would be the date on which the sample of food was collected, though that observation was not part of the ratio of that judgement but simply an observation. Para 15 of the judgement of **Ashok Kumar Pal's case (supra)** is quoted as under;

*"15. From the perusal of Section-77 of the Act, 2006, it is explicit that the court can take cognizance up to three years from the date of commission of the offence. A commission of an offence under the Act, 2006 can be considered on the date when the sample was collected. In the present case, the sample was collected on 02.11.2010 and the proceeding was initiated under the Act, 1954, despite repealing the same. Therefore, that proceeding was not saved u/s 97 of the Act, 2006. Therefore, even if the fresh complaint is filed under the Act, 2006 then the concerned court cannot take cognizance in view of the bar of Section-77 of the Act, 2006. Therefore, the contention of learned counsel for the applicant is correct that now the prosecution is barred u/s 77 of the Act, 2006 as the sample of the milk was collected on 02.11.2010, therefore, cognizance cannot be taken in a fresh complaint filed under the Act, 2006."*

8. Hon'ble Apex Court in the case of **State of Rajasthan vs Sanjay Kumar and others; (1998) 5 SCC 82**, considering Section 469 of Cr.P.C. for the purpose of the Drugs and Cosmetic Act, 1940 observed that the date of commission of offence would be the date on which the report of Government Analyst was received. Paras 8 and 9 of **State of Rajasthan vs Sanjay Kumar's case (supra)** is quoted as under;

*"8. Now we shall see which clause of sub-section (1) of Section 469 is attracted to the facts of the case. For this purpose it will be necessary to revert to the facts of this case. The essence of the offences charged is manufacture of adulterated, sub-standard, misbranded, spurious drugs within the meaning of the relevant provisions of the Act and/or storage, distribution and sale of such drugs in contravention of the provisions of the Act. On the date of collection of samples from Respondent 16, on 29-2-1988, it could not have been said that any offence was committed as selling of drugs per se is no offence and the quality of the drugs was not known to the Drugs Inspector, the complainant on that date. It is only when the report of the Government Analyst was received, that it came to light that the provisions of the Act are violated and offence is committed. So on the facts of this case it cannot be said that clause (a) of Section 469(1) is attracted. That the drugs which were offered for sale were sub-standard/adulterated within the meaning of the Act, came to the knowledge of the Drugs Inspector only on 2-7-1988 when the report of the Government Analyst was received by him; and therefore, clause (b) of Section 469(1) will be attracted.*

*9. Under cognate legislations of different States, similar questions arose before the High Courts. In R.S. Arora v. State [1987 Cri LJ 1215 : (1987) 1 FAC 283 (Del)] the question which fell for consideration of the Delhi High Court was whether for prosecution under Sections 7, 19 and 16(1) of the Seeds Act, 1966, the period of limitation of six months would start from the date of collection of samples under clause (a) or from the date of Seed Analyst's report for purposes of clause (b) of Section 469(1) CrPC. The learned Single Judge of the Delhi High Court took the view that the limitation commences from the date of submission of the report by the Seed Analyst to the Inspector, so Section 469(1)(b) would apply. The same view was taken by the Bombay High Court in Omprakash Gulabchandji Partani v. Ashok [1992 Cri LJ 2704 (Bom)] .*

**9. Ratio of State of Rajasthan vs Sanjay Kumar (supra) is also applicable in the Act, 2006 because, at the time of collection of a sample of food, no offence can be said to be committed as there is no prohibition to sell food which is not prohibited. It is only when Food Analyst Report received about unfit/unsafe food, offence can be said to be committed. In case of sell of unsafe or sub-standard milk, the date of commission of offence would be the date when the report of Food Analyst is received about its quality.**

10. Thus applying the above Principle of Law in the present case, date of commission of offence would be 10.12.2017. Thereafter application for seeking approval was submitted by the Food Safety Officer on 14.05.2018 and approval under Section 77 of the Act, 2006 was granted on 20.06.2019. Therefore period between 14.05.2018 to 20.06.2019 would be excluded because of Section

470(3) Cr.P.C., as Section 470(3) Cr.P.C. provides exclusion of time taken by Sanctioning Authority in computation of limitation. Therefore complaint filed on 04.07.2019 was well within one year.

11. As per the law laid down in **Sarah Mathew vs Institute of Cardio Vascular Diseases and others; (2014) 2 SCC 62,** the date of cognizance would be the date when the complaint is filed. Para 51 of **Sarah Mathew's case (supra)** is quoted as under;

*"51. In view of the above, we hold that for the purpose of computing the period of limitation under Section 468 Cr.P.C. the relevant date is the date of filing of the complaint or the date of institution of prosecution and not the date on which the Magistrate takes cognizance. We further hold that Bharat Kale which is followed in Japani Sahoo lays down correct law. Krishna Pillai will have to be restricted to its own facts and it is not the authority for deciding the question as to what is the relevant dated for the purpose of computing the period of limitation under Section 468 Cr.P.C."*

12. In view of the above facts and legal position, in the present case cognizance is not barred under Section 77 of the Act, 2006 or under Section 468 Cr.P.C.

13. Even if it is accepted for the sake of argument, the complaint was filed after one year from the date of commission of offence, even then the Commissioner had granted approval for prosecution within 3 years from the date of offence in exercise of power under Section 77 of the Act, 2006. Section 77 of the Act, 2006 is being quoted as under;

*"Section-77. Time limit for prosecutions.- Notwithstanding anything contained in this Act, no court shall take cognizance of an offence under this Act after the expiry of the period of one year from the date of commission of an offence:*

*Provided that the Commissioner of Food Safety may, for reasons to be recorded in writing, approve prosecution within an extended period of up to three years.*

14. From the perusal of order of the Commissioner of Food Safety, it appears that reason was recorded while granting approval within the extended period of 3 years for initiating prosecution, therefore, the contention of counsel for the applicant that no reason was recorded by the Commissioner of Food Safety while granting approval for prosecution after the expiry of the period of one year under Section 77 of the Act, 2006 is incorrect.

**15. So far as the contention of counsel for the applicant that the offence is punishable for one year and because of Section 468 Cr.P.C., the cognizance cannot be taken after one year is concerned, is incorrect because as per Section 77 of the Act, 2006 prosecution even after one year can be approved by the Commissioner, Food Safety and the same has already been approved by the Commissioner by order dated 20.06.2019. The specific provision of extension of limitation provided under Section 77 of the Act, 2006 will prevail over Section 468 Cr.P.C. because of Section 89 of the Act, 2006. Section 89 of Act, 2006 is quoted as follows;**

***"89. Overriding effect of this Act over all other food related laws**. -The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for*

*the time being in force or in any instrument having effect by virtue of any law other than this Act."*

16. The Apex Court in the case of **Ram Nath vs. State of Uttar Pradesh and others; (2024) 3 SCC 502** also considered this issue and held that provision of Act, 2006 will prevail over the provision of any other Act. Para 26, 27 and 28 of Ram Nath's case (supra) are quoted as below;

*"26. Thus, there are very exhaustive substantive and procedural provisions in FSSA for dealing with offences concerning unsafe food.*

*27. In this context, we must consider the effect of Section 89 FSSA. Section 89 reads thus:*

*"89. Overriding effect of this Act over all other food related laws. The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect of virtue of any law other than this Act."*

*The title of the Section indeed indicates that the intention is to give an overriding effect to FSSA over all "food-related laws". However, in the main section, there is no such restriction confined to "food-related laws", and it is provided that provisions of FSSA shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. So, the section indicates that an overriding effect is given to the provisions of FSSA over any other law.*

*28. The settled law is that if the main section is unambiguous, the aid of the title of the section or its marginal note cannot be taken to interpret the same. Only if it is ambiguous, the title of the section or the marginal note can be looked into to understand the intention of the legislature."*

17. From the above observation in the judgement of **Ram Nath's case (supra),** it is clear that the overriding effect of the FSS Act is not confined to only food-related laws but also other Laws including Cr.P.C.

18. So far as the contention of counsel for the applicant that being sub-standard sample, the applicant can be prosecuted under Section 51 not under Section 59, this issue can be raised at the time of framing of charge and same cannot be a ground for quashing the proceeding.

19. In view of the above, this Court does not find any illegality in the impugned order as well as impugned proceeding. Accordingly, the present application is **dismissed**.

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**(2024) 11 ILRA 413**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 08.11.2024**

**BEFORE**

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

Arbitration & Conciliation Application U/S 11(4)
No. 95 of 2023

**Ram Taulan Yadav & Anr. ...Applicants**
**Versus**
**Himanshu Kesarwani & Ors. ...Respondents**

**Counsel for the Applicants:**
Prabhav Srivastava, Rishabh Srivastava, Ujjawal Satsangi

**Counsel for the Respondents:**
Abhay Kumar Singh

**Civil law- Arbitration and Conciliation Act, 1996 — Sections 11(6 ) & 11(8) — Appointment of arbitrator — Partnership dispute — Whether arbitration clause in prior agreements binds non-signatory inducted under supplementary deed — supplementary deed executed in continuation of earlier partnership deeds — Arbitration clause in earlier deeds binds non-signatory partner — Partnership Act, 1932 — Section 69(3) — Unregistered firm — Bar on other proceedings — Applicability to arbitration —arbitral proceedings not hit by Section 69(3 ).**

**Stamp Act, 1899 — Sections 33 & 35 — Arbitration agreement inadequately stamped — Effect on Section 11 application — Held, non-stamping not a ground to reject request for appointment — Defect curable and to be decided by arbitral tribunal.**
**Non-signatory to arbitration agreement — Whether bound by prior agreement — Supplementary deed silent on arbitration — Held, supplementary agreement incorporated earlier partnership terms — Issue whether non-signatory is bound by arbitration clause to be decided by arbitral tribunal.**

**Multiple agreements forming single contractual relationship — Interpretation — Held, supplementary deed executed to incorporate change in partners — Prior terms including arbitration clause remain binding — Arbitration maintainable even in absence of express clause in latest deed - Constitution of arbitral tribunal directed. (Paras 7,8,9,14, 15, 16, and 17)**

**HELD:**

The first issue which, thus, falls for consideration is whether the partnership deed being unregistered, the dispute between the partners could be referred to the arbitral tribunal or the bar contained in Section 69(3) of the Partnership Act would operate. The issue is no more res integra. In Umesh Goel Vs Himachal Pradesh Cooperative Group Housing Society Limited, the Supreme Court has held that the expression "other proceedings" in Section 69(3) of the Partnership Act does not cover arbitral proceedings as well as arbitral award. The same view has been taken in Shiv Developers through its partner Sunilbhai Sombhai Ajmeri Vs Aksharay Developers & ors.. Accordingly, the contention is devoid of any merit. (Para 7)

The issue as to whether the agreements could not be enforced because of any deficiency in stamp duty is also squarely covered by the judgement of Supreme Court in Interplay Between Arbitration Agreements under Arbitration and Conciliation Act, 1996 and Stamp Act, 1899, In Re. (Para 8)

Thus, in case, there is any deficiency in stamp duty an objection to the said effect can be taken before the arbitral tribunal but the same would not detain the Court from entertaining application for constitution of an arbitral tribunal. (Para 9)

Above view stands fortified by some of the decisions noted hereinafter. A similar controversy was considered by Calcutta High Court in Juggilal Kamlapat v. N.V. Internationale CredietEn-Handels Vereeninging 'Rotterdam'. It was held that the arbitration clause contained in the earlier deeds would continue to govern the rights and obligations of the parties. (Para 14)

Similar view has been taken by Gujarat High Court in Creative Infocity Ltd. Vs Gujarat Informatics Ltd. In the said case, a concession agreement was executed between Gujarat Informatics Limited, a Government owned company and a private joint venture company (appellant) for private sector participation in infrastructure projects. It contemplated execution of master lease in favour of the appellant in furtherance of the concession agreement. The concession agreement provided for arbitration clause but it was missing in the master lease agreement. The issue before the court was whether arbitration clause in concession agreement would survive after execution of master lease agreement. The entire objective of the scheme was examined and it was concluded that the master lease agreement was entered into between parties in pursuance of concession agreement. Accordingly, the arbitration clause in the original concession

agreement was held to govern the jural relationship between the parties. (Para 15)

The Constitution Bench in Cox and Kings Ltd. (supra) examined the issue as to whether a non-signatory to an agreement can be held bound by it. It is held that the said issue may require consideration of evidence on factual aspects and ordinarily it should be left to the tribunal to decide the same. At the referral stage, a referral court should not enter into the said issue. Following the law laid down in the Constitution Bench judgement in Cox and Kings Ltd. (supra), the Supreme Court while deciding Arbitration Petition No.38 of 2020, constituted the arbitral tribunal but left it open to the parties to raise the said issue before it. Accordingly, I am of the view that the said issue which involves appreciation of evidence should be left to the wisdom of the arbitral tribunal for being decided in accordance with law. (Para 17)

In the result, I am of the opinion that the arbitration clause in the partnership agreement dated 2 March 2020 read with supplementary partnership agreement dated 20 February 2021 would merit constitution of an arbitral tribunal. This would be without prejudice to the pleas and contentions of the parties. (Para 18)

**Constitution of Arbitration Tribunal directed.** (E-14)

**List of Cases cited:**

1. Interplay Between Arbitration Agreements under Arbitration & Conciliation Act, 1996 & Stamp Act, 1899, In Re; (2024) 6 SCC 1

2. All India Power Engineer Federation Vs Sasan Power Ltd.; 2017 (1) SCC 487

3. Cox & Kings Ltd. Vs SAP India Pvt. Ltd. & another; (2024) 4 SCC 1

4. Arbitration Petition No. 38 of 2020 decided on 9 September 2024

5. Umesh Goel Vs Himachal Pradesh Cooperative Group Housing Society Limited; (2016) 11 SCC 313

6. Shiv Developers through its partner Sunilbhai Sombhai Ajmeri Vs Aksharay Developers & ors.; (2022) 13 SCC 772

7. N.N. Global Mercantile (P) Ltd. Vs Indo Unique Flame Ltd., (2023) 7 SCC 1 : (2023) 3 SCC (Civ) 564

8. SMS Tea ESt.s (P) Ltd. Vs Chandmari Tea Co. (P) Ltd., (2011) 14 SCC 66 : (2012) 4 SCC (Civ) 777

9. Garware Wall Ropes Ltd. Vs Coastal Marine Constructions & Engg. Ltd., (2019) 9 SCC 209 : (2019) 4 SCC (Civ) 324

10. Juggilal Kamlapat Vs N.V. Internationale CredietEn-Handels Vereeninging 'Rotterdam'; AIR 1955 Cal 65

11. Creative Infocity Ltd. Vs Gujarat Informatics Ltd.; MANU/GJ/0516/2009

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

1. As per office report dated 26.07.2023, opposite party No. 1 has been duly served by registered post but no one has appeared on his behalf. In respect of opposite party No. 2, the notice sent to him by registered post has returned with the endorsement of refusal. Thus, service on the said respondent is also sufficient. However, no one has appeared on his behalf also.

2. Heard Shri Ujjawal Satsangi and Shri Rishabh Srivastava along with Shri Prabhav Srivastava, learned counsel for the applicants and Shri Abhay Kumar Singh, learned counsel for opposite party No. 3.

3. The instant application under Section 11 of the Arbitration and Conciliation Act, 1996 has been filed by the applicants invoking the power of this Court to constitute an arbitral tribunal in

respect of the disputes arising between the parties out of partnership agreements dated 29 August 2016, 2 March 2020 and 20 February 2021.

4. The facts in brief are that a partnership agreement was executed on 29 August 2016 between applicant no. 1 (Ram Taulan Yadav) and one Sheela Yadav for doing business in the name of M/s Autar & Associates. As per Clause 14 of the said agreement all disputes and differences arising between the parties would be referred to mutually acceptable arbitration. On 2 March 2020, a retirement-cum-partnership deed was executed in respect of the partnership business. Thereby, Smt. Sheela Yadav retired from the partnership firm while Smt. Madhu Yadav (Applicant No. 2), Ram Milan Yadav, Himanshu Kesarwani (Opposite party No. 1) Saurabh Kesarwani (Opposite party No. 2) were introduced as new partners. The share of each of them is mentioned in Clause-1 of the partnership deed. Clause 17 of the said agreement also contains an arbitration clause for referring all disputes and differences to mutually acceptable arbitration. On 20 February 2021, a supplementary deed of partnership was executed whereby Ram Milan Yadav retired from the partnership firm with effect from 31 March 2021 and Radhey Shyam Mishra (opposite party No. 3) was inducted as a new partner. It seems that thereafter a memorandum of understanding (MoU) dated 09.09.2022 was executed between the partners of the firm and thereunder, the parties agreed that the properties given by the applicants in mortgage to secure the loan taken by the firm from the financial institutions would be released and thereafter, the applicants would retire from the partnership firm. In compliance of the said arrangement, four properties of the applicants were redeemed from mortgage, however, five properties remained mortgaged. This gave rise to disputes and differences between the parties, the resolution of which has been sought through arbitration. The applicants suggested name of three arbitrators vide its notice dated 15 April 2023. Opposite party no. 1 agreed to the name of Mr. Justice Vipin Sinha, Former Judge of this Court whereas opposite parties No. 2 & 3 did not respond to the notice.

5. Opposite party No. 3 has filed counter affidavit and has opposed the appointment of arbitral tribunal. The main grounds to oppose the constitution of arbitral tribunal are (1) the partnership firm was unregistered and partnership deed was not properly stamped, therefore, bar of Section 69 of the Partnership Act, 1932 and Sections 33 and 35 of the Stamp Act, 1899 would apply; (2) there was no arbitration clause in the supplementary partnership agreement dated 20 February 2021 whereby opposite party No. 3 was inducted as partner in the partnership firm for the first time. The arbitration clauses in the previous agreements are not binding on opposite party No. 3 as he was not signatory to these agreements.

6. Learned counsel for the applicants, on the other hand, submits that bar under Section 69 of the Partnership Act does not apply to arbitration proceedings. He further submits that in case, there is any deficiency in stamp duty, the same can be agitated before the arbitral tribunal but on this ground the prayer for appointment of arbitrator cannot be rejected. In support of his contention, he places reliance on a recent Constitution Bench judgment in **Interplay Between Arbitration Agreements under Arbitration and**

**Conciliation Act, 1996 and Stamp Act, 1899, In Re.** It is further submitted by him that the supplementary agreement whereby opposite party no. 3 was inducted as partner in the partnership firm was in continuation of the earlier two partnership agreements. Therefore, all the three agreements have to be read together. In support of his contention, he places reliance on the judgment of the Supreme Court in **All India Power Engineer Federation v. Sasan Power Ltd..** It is further submitted that the question as to whether opposite party No. 3 was signatory and a consenting party to the arbitration clause should be left for being decided by the arbitral tribunal as laid down by Supreme Court in **Cox & Kings Ltd. v. SAP India Pvt. Ltd. & another** and in **Arbitration Petition No. 38 of 2020** decided on 9 September 2024.

7. The first issue which, thus, falls for consideration is whether the partnership deed being unregistered, the dispute between the partners could be referred to the arbitral tribunal or the bar contained in Section 69(3) of the Partnership Act would operate. The issue is no more *res integra*. In **Umesh Goel vs. Himachal Pradesh Cooperative Group Housing Society Limited,** the Supreme Court has held that the expression "other proceedings" in Section 69(3) of the Partnership Act does not cover arbitral proceedings as well as arbitral award. The same view has been taken in **Shiv Developers through its partner Sunilbhai Sombhai Ajmeri vs. Aksharay Developers and Others.** Accordingly, the contention is devoid of any merit.

8. The issue as to whether the agreements could not be enforced because of any deficiency in stamp duty is also squarely covered by the judgement of Supreme Court in **Interplay Between Arbitration Agreements under Arbitration and Conciliation Act, 1996 and Stamp Act, 1899, In Re.** In the said Constitution Bench judgement, the Supreme Court in the conclusions recorded in paragraph 235 has observed as follows:

"235. The conclusions reached in this judgment are summarised below:

235.1. Agreements which are not stamped or are inadequately stamped are inadmissible in evidence under Section 35 of the Stamp Act. Such agreements are not rendered void or void ab initio or unenforceable;

235.2. Non-stamping or inadequate stamping is a curable defect;

235.3. An objection as to stamping does not fall for determination under Sections 8 or 11 of the Arbitration Act. The Court concerned must examine whether the arbitration agreement prima facie exists;

235.4. Any objections in relation to the stamping of the agreement fall within the ambit of the Arbitral Tribunal; and

235.5. The decision in **N.N. Global (2)** and **SMS Tea Estates** are overruled. Paras 22 and 29 of **Garware Wall Ropes** are overruled to that extent."

9. Thus, in case, there is any deficiency in stamp duty an objection to the said effect can be taken before the arbitral tribunal but the same would not detain the Court from entertaining application for constitution of an arbitral tribunal.

10. The second and the main issue is whether the arbitration clauses in two previous agreements between the earlier partners is enforceable as against opposite party no.3, who was inducted into the partnership firm in pursuance of the

supplementary partnership agreement dated 20 February, 2021 and which admittedly does not contain any arbitration clause. As noted above, the partnership firm was constituted in pursuance of the partnership agreement dated 29 August, 2016. It was between Ram Taulan Yadav (applicant no.1) and Sheela Yadav. The share of the partners was 65% and 35% respectively. On 2 March, 2020, a retirement-cum-partnership deed was executed whereby Sheela Yadav retired from the partnership firm and four new partners were inducted namely, Madhu Yadav, Ram Milan Yadav, Himanshu Kesarwani and Saurabh Kesarwani. The said partnership agreement, as noted above, specifically refers to the previous partnership deed dated 1 March, 2020 and also contains an arbitration clause in same terms. The supplementary partnership deed dated 20 February, 2021 whereby opposite party no.3 was inducted as a partner and Ram Milan Yadav retired from the partnership firm since 31 March, 2021 also refers to the previous partnership deed dated 2 March, 2020. It also specifically mentions that the business will be continued by the reconstituted firm in the same name i.e. M/s Autar & Associates.

11. Some of the crucial clauses of the preamble to the supplementary partnership deed dated 20 February, 2021 are as follows:

"As they are planning to expand their business they have introduced new partners to the above firm namely, Sri Radhey Shyam Mishra and one of the partners Sri Ram Milan Yadav has decided as per his own will to retire from the partnership.

In case of death of introduced partner i.e. Shri Radhey Shyam Mishra, his legal successors Mr. Anil Mishra (Aadhar Card No. 7858 9014 5303) S/o Sri Radhey Shyam Mishra R/o 89/76, Mahaviran Lane Mutthiganj, Allahabad and Mr. Rahul Mishra (Aadhaar Card No. 7553 1490 1256) S/o Sri Radhey Shyam Mishra R/o 89/76, Mahaviran Lane Mutthiganj, Allahabad will receive all the rights of partnership deed.

AND WHEREAS to avoid any disputes or misunderstanding in future, the parties have agreed to certain terms and conditions and it is desirable to reduce the amended terms and conditions governing the said partnership to this deed of partnership into writing:"

(emphasis supplied)

12. A perusal of the aforesaid clauses reveals that supplementary partnership deed was executed in continuation of the earlier partnership deed. It specifically mentions that the same was executed so as to reduce to writing the amended terms and conditions governing the said partnership. Clause 1 of the supplementary partnership deed specifies the contribution of each partner and Clause 2, their shares which is equal to their contribution. The manner in which the profits and losses were to be shared is mentioned in Clause 3. The manner in which the bank accounts were to be operated by the reconstituted firm is mentioned in Clauses 4 and 5. It is pertinent to note that various other matter dealt with in the previous deed relating to interest and remuneration, books of accounts, partners dealings, terms of partnership, disputes and differences have not been dealt with in the supplementary partnership deed. It is evidently for the reason that these clauses in the previous deed would continue to bind the parties. It is only the terms which required

amendment as a result of reconstitution of the firm which were mentioned in the supplementary partnership deed. The intention of the parties that their legal relationship in respect of other matters would continue to be governed by the previous partnership deed is also borne out from the preamble of the supplementary partnership deed, wherein it is specifically mentioned that the supplementary partnership deed was being executed to have a record of the amended terms and conditions of the partnership deed.

13. It is noteworthy that memorandum of understanding executed between the parties and to which opposite party No. 3 is also a signatory, also refers to the original partnership deed dated 29.08.2016, and amended deeds dated 02.03.2020 and 20.02.2021. *Prima facie*, it evinces that the subsequent deeds were executed to reduce to writing the change in constitution of the firm while the firm name and other legal obligations not specifically altered by subsequent deeds remain the same.

14. Above view stands fortified by some of the decisions noted hereinafter. A similar controversy was considered by Calcutta High Court in **Juggilal Kamlapat v. N.V. Internationale Crediet-En-Handels Vereeninging 'Rotterdam'**. It was held that the arbitration clause contained in the earlier deeds would continue to govern the rights and obligations of the parties. The relevant extract is as follows:

"The effect of the alterations or modifications is that there is a new arrangement; in the language of Viscount Haldane in Morris v. Baron & Co. (1) (1918 Appeal Cases, 1 at 17), "a new contract containing as an entirety the old terms together with and as modified by the new terms incorporated." The modifications are read into and become part and parcel of the original contract. The original terms also continue to be part of the contract and are not rescinded and/or superseded except in so far as they are inconsistent with the modifications. Those of the original terms which cannot make sense when read with the alterations must be rejected. In my view the arbitration clause in this case is in no way inconsistent with the subsequent modifications and continues to subsist." [para 15]"

15. Similar view has been taken by Gujarat High Court in **Creative Infocity Ltd. vs. Gujarat Informatics Ltd.** In the said case, a concession agreement was executed between Gujarat Informatics Limited, a Government owned company and a private joint venture company (appellant) for private sector participation in infrastructure projects. It contemplated execution of master lease in favour of the appellant in furtherance of the concession agreement. The concession agreement provided for arbitration clause but it was missing in the master lease agreement. The issue before the court was whether arbitration clause in concession agreement would survive after execution of master lease agreement. The entire objective of the scheme was examined and it was concluded that the master lease agreement was entered into between parties in pursuance of concession agreement. Accordingly, the arbitration clause in the original concession agreement was held to govern the jural relationship between the parties. The relevant observations in this behalf are as follows:

"7. As stated above, the Master Lease Agreement was entered into between

the defendant and the plaintiff and 116 acres of the land came to be leased to be plaintiff as per Concession Agreement. Therefore, it can be said that the Master Lease Agreement is in furtherance of Concession Agreement and the parties were to act as provided in Concession Agreement as well as in Master Lease Agreement. Therefore, it can be said that the Concession Agreement can be said to be the main agreement, and therefore, as such both the agreements, Concession Agreement and Master Lease Agreement are required to be read together and cannot be read in isolation, as sought to be contended on behalf of the plaintiff. As stated hereinabove, the Concession Agreement contemplated as one of its Schedule Master Lease Agreement. It appears that thereafter dispute arose between the plaintiff and the defendant with respect to various breaches by the plaintiff, and therefore, the defendant issued Preliminary Notice with respect to the Concession Agreement and a termination notice in respect to the Master Lease Agreement providing an opportunity to the plaintiff to cure and remedies the breaches within 60 days. Thereafter, as the defendant (G.I.L.) was satisfied with the cause of issuance of the notices were largely unresolved, despite the lapse of more than 15 months, the defendant issued the notice of termination of Concession Agreement and the Master Lease Agreement vide Termination Notices dated 12-8-2008. The said termination notices were challenged by the plaintiff before this Court by way of Special Civil Application No. 10840 of 2008 which came to be withdrawn by the plaintiff. It is to be noted at this stage that in Special Civil Application No. 10840 of 2008, it was specifically contended on behalf of the plaintiff that the Concession Agreement takes part and does not stand terminated upon execution of the Master Lease Agreement and it was also specifically pleaded while challenging the termination notices in the said Special Civil Application that the dispute was required to be resolved through arbitration as provided under Clause 24 of the Concession Agreement and a grievance was made that the defendant had not proceeded thereunder. It is also to be noted that in Para 33(a) in the said Special Civil Application No. 10840 of 2008 even the plaintiff had prayed for writ, direction and/ or order commanding the respondent herein-original defendant to annul the termination notices dated 12-8-2008 and to hold that the aforesaid Concession Agreement and the Master Lease Agreement continue to operate and hold the field. Even considering various correspondences between the plaintiff and the defendant i.e. documents which are produced at Exh. 39/1 to 39/9, all throughout the case of the plaintiff is that both the agreements, Concession Agreement and Master Lease Agreement exist and in fact even the plaintiff has admitted the shelter of the Arbitration Clause provided in Concession Agreement. Therefore, the contention on behalf of the plaintiff that on execution of the Master Lease Agreement, Concession Agreement does not exist and/or has come to an end cannot be accepted."

16. Undoubtedly, all the parties, except opposite party No. 3 has signed the previous agreement dated 2 March 2020. Prima facie, opposite party No.3, though not signatory to the said agreement, had consented to its terms and conditions to the extent not altered or amended by subsequent supplementary partnership deed dated 20.02.2021.

17. The Constitution Bench in **Cox and Kings Ltd.** (supra) examined the issue as to whether a non-signatory to an agreement can be held bound by it. It is held that the said issue may require consideration of evidence on factual aspects and ordinarily it should be left to the tribunal to decide the same. At the referral stage, a referral court should not enter into the said issue. Following the law laid down in the Constitution Bench judgement in **Cox and Kings Ltd.** (supra), the Supreme Court while deciding Arbitration Petition No.38 of 2020, constituted the arbitral tribunal but left it open to the parties to raise the said issue before it. Accordingly, I am of the view that the said issue which involves appreciation of evidence should be left to the wisdom of the arbitral tribunal for being decided in accordance with law.

18. In the result, I am of the opinion that the arbitration clause in the partnership agreement dated 2 March 2020 read with supplementary partnership agreement dated 20 February 2021 would merit constitution of an arbitral tribunal. This would be without prejudice to the pleas and contentions of the parties.

19. The court proposes the name of Mr. Justice Vipin Sinha, Former Judge of this Court R/o 10, N.K. Mukherji Road, behind Rajapur Roadways Workshop, Civil Lines, Prayagraj (Mob. No. 9415309091) as arbitrator to decide the disputes between the parties. The fees shall be as provided under the Fourth Schedule to the Arbitration and Conciliation Act, 1996.

20. Let the office seek consent and obtain disclosures as contemplated under Section 11(8) of the Act.

21. The instant application will be put up for further orders after receipt of consent/disclosures from the proposed arbitrator in the month of December, 2024.

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**(2024) 11 ILRA 421**
**APPELLATE JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 14.11.2024**

**BEFORE**

**THE HON'BLE SAMIT GOPAL, J.**

Criminal Misc. Bail Application No. 32236 of 2024

**Padam Singhee ...Applicant**
**Versus**
**Directorate of Enforcement ...Opposite Party**

**Counsel for the Applicant:**
Ram M. Kaushik

**Counsel for the Opposite Party:**
Jitendra Prasad Mishra, Pawan Kumar Srivastava

**Criminal law- Criminal Procedure Code, 1973 — Section 439 — Bail application- Prevention of Money Laundering Act, 2002 — Sections 3, 4 & 45 — Bail — Prolonged incarceration — Delay in trial —Trial of predicate offence yet to begin — Cognizance taken in PMLA case without charge sheet in predicate offence — existence of predicate offence is sine qua non for trial under PMLA — Delay in trial infringes fundamental right under Article 21 — PMLA — Section 45 — Twin conditions — Not absolute — Can be relaxed in cases of undue delay and where accused is already on bail in predicate offence-Bail granted. (Paras 5,6,8 and 9)**

**HELD:**
After having heard learned counsels for the parties and perusing the records, it is evident that- (1) The applicant is in custody in

connection with an offence under Prevention of Money Laundering Act. (2) In the predicate offence he has been granted bail. The said order stands final till date. (3) No charge sheet has been submitted in the predicate offence with regards to the present issue being committed relating to Punjab National Bank till date. (4) The law with regards to trial is clear and well settled. (5) The case under PMLA and the predicate offence has to be tried together by the same court which is not possible in the present case as of now since predicate offence is yet to see its charge sheet, if any. (6) The challenge to declaring M/s SVOGL Oil Gas & Energy Limited as "Wilful Defaulter" and its account as "Fraud" was successful and the same was struck down by Hon'ble Delhi High Court. The said order also attains finality. (7) Custodial interrogation is not needed. The principle of "bail is a rule and jail is an exception" is being consistently followed and repeatedly being reiterated and reminded by the Apex Court and other Courts. (9) The applicant is in jail since 07.02.2024. (10) There are no chances of his absconding. (11) Looking to the facts and circumstances of the case, it is a fit case for grant of bail. (Para 8)

**Bail Application allowed.** (E-14)

**List of Cases cited:**

1. V. Senthil Balaji Vs Deputy Director, Directorate of Enforcement: 2024 SCC OnLine SC 2626

2. K.A. Najeeb, (2021) 3 SCC 713

3. Manish Sisodia Vs Directorate of Enforcement, 2024 SCC OnLine SC 1920

4. Arvind Kejriwal Vs C.B.I.: 2024 SCC OnLine SC 2550

5. Prem Prakash Vs U.O.I. through the Directorate of Enforcement: 2024 SCC OnLine SC 2270

6. Jalaluddin Khan Vs U.O.I.: 2024 SCC OnLine SC 1945

7. Ramkripal Meena Vs Directorate of Enforcement: 2024 SCC OnLine SC 2276

8. Sk. Javed Iqbal Vs St. of U.P.: (2024) 8 SCC 293

9. Javed Gulam Nabi Shaikh Vs St. of Mah. & anr.: 2024 SCC OnLine SC 1693

10. Shoma Kanti Sen Vs St. of Mah.: (2024) 6 SCC 591

11. Sanjay Agarwal Vs Directorate of Enforcement: 2022 SCC OnLine SC 1748

(Delivered by Hon'ble Samit Gopal, J.)

1. Heard Sri Kapil Sibal, learned Senior Advocate through Video Conferencing assisted by Sri Tanveer Ahmad Mir, Sri Ram M. Kaushik, learned counsels for the applicant, who are present in Court and Sri Gyan Prakash, learned Senior Advocate / Additional Solicitor General, Government of India assisted by Sri J.P. Mishra and Sri Kuldeep Srivastava, learned counsels for the Enforcement of Directorate/opposite party.

2. This Criminal Misc. Bail Application under Section 439 Code of Criminal Procedure,1973 has been filed by the applicant- Padam Singhee with the following prayers:-

"It is, therefore, most respectfully prayed that this Hon'ble Court may graciously be pleased to allow the present bail application and direct to release the applicant on bail in Enforcement Case Information Report bearing No. ECIR/DLZO-I/35/2021 under Section ¾ of Prevention of Money Laundering Act, 2002 lodged by the Directorate of Enforcement on 26.03.2021.

It is further prayed that this Hon'ble Court may graciously be pleased to release the Applicant on Interim Bail in relation to Enforcement Case Information Report bearing No. ECIR/DLZO-I/35/2021

under Section ¾ of Prevention of Money Laundering Act, 2002 lodged by the Directorate of Enforcement on 26.03.2021; during the pendency of the present case before this Hon'ble Court, otherwise the personal liberty of the Applicant shall be at stake which cannot be compensated in any manner and/or to pass such other and further order this Hon'ble Court may deem fit and proper under the facts and circumstance of the case."

3. The facts of the case are that a complaint dated 05.04.2024 was filed by the Assistant Director (PMLA), Directorate of Enforcement, Delhi Zonal Office-I, New Delhi against (i) M/s SVOGL Oil Gas & Energy Limited (through the then Chairman and Managing Director, Sh. Prem Singhee and the then Joint Managing Director) Tower-1, Fifth Floor, NBCC Plaza, Sector V, Push Vihar, New Delhi-110017, (ii) Mr. Padam Singhee S/o Late Sh. Chimanlal Singhee, Director of M/s. SVOGL and; (iii) Mr. Prem Singhee S/o Late Sh. Chimanlal Singhee, Director of M/s. SVOGL, (iv) M/s Practical Properties Private Limited (through Authorized Representative), 432-E, F/F Devli Village New Delhi South Delhi-110052, (v) M/s Bee Tee Credit Marketing Private Limited (through Authorized Representative), 90/N, New Alipore, 3rd Floor Flat No. 4, Block E, Kolkata West Bengal 700053, (vi) M/s Resimpex Real Estate Private Limited (through Authorized Representative), 605, Suncity Business Tower, Golf Course Road, Sector-54, Gurugram, Haryana 122001 and (vii) M/s Realtech Property Solution Private Limited (through Authorized Representative), 133-A, Flat No. 7, F/F, R/S, B/P, kh No. 301/350 Saidulajab Westend Marg, New Delhi South West Delhi 110030 with the following prayers:-

"Therefore, in the facts and circumstances stated hereinabove, it is most humbly prayed that;

a. This Hon'ble Court may be pleased to take cognizance of the offence of money laundering as defined u/s 3, punishable u/s 4 of Prevention of Money Laundering Act, 2002, and proceed in accordance with law, issue summons against accused persons, try and punish according to law.

b. To pass appropriate order for confiscation of properties, to the extent of proceeds of crime of this case, frozen during search action dated 15.12.2024 and 06.01.2024 being proceeds of crime in terms of section 8 (5) of Prevention of Money Laundering Act, 2002.

c. Confiscate the properties attached vide Provisional Attachment Order No. 04/2024 dated 25.01.2024 in terms of section 8(5) of PMLA, 2002.

d. Confiscate the properties attached vide Provisional Attachment Order No.06/2024 dated 22.03.2024 in terms of section 8(5) of PMLA, 2002.

e. The Complaint craves leave of the Hon'ble Court to file Supplementary prosecution Complaint, if required.

f. To grant any other relief, which this Hon'ble Court deem fit and proper, in the facts and circumstances of the case."

The court took cognizance upon the same and summoned the accused persons vide an order of the same date. The applicant is in jail since 07.02.2024 in the said case.

4. The allegation involved are under the Prevention of Money Laundering Act, 2002 in the present matter. M/s SVOGL Oil Gas & Energy Limited availed credit facilities from Punjab National Bank between 2006 and 2017. Padam Singhee and Prem Singhee key managerial persons

of M/s SVOGL and others through associate entities siphoned off the loans availed by indulging in criminal conspiracy and generated Proceeds of Crime within the meaning of Section 2(1) (u) of PMLA. The loss incurred to the Complainant Bank is to the tune of Rs. 252,61,46,476/- which constitutes Proceeds of Crime in the instant case.

5. Learned counsel for the applicant submitted as under:-

(1) Loan was taken by the company of which the applicant is the Joint Managing Director.

(2) The said loan was not repaid.

(3) The account of loan of the company was declared NPA with retrospective effect from 26.12.2013.

(4) No offence thus is made out in the above mentioned situation and circumstances.

(5) On the basis of a complaint lodged by Punjab National Bank, NOIDA, a First Information Report bearing FIR No. RCBD1/2021/E/0001, dated 10.03.2021 was registered by the Central Bureau of Investigation under Sections 120B r/w 409 & 420 I.P.C. and Section 13(2) r/w 13(1)(d) of Prevention of Corruption Act, 1988 against the applicant and others being the predicate offence in which the applicant has been granted bail vide order dated 14.5.2024 passed by Special Judicial Magistrate (C.B.I.), Ghaziabad, copy of the said order has been annexed as annexure no. 5 to the affidavit.

(6) No charge sheet till date has been submitted in the predicate offence particularly with regards to the issue relating to Punjab National Bank.

(7) The claim of the Bank for declaring M/s SVOGL Oil Gas & Energy Limited as a "Wilful Defaulter" or its account as "Fraud" has been struck down by Hon'ble Delhi High Court vide its order dated 12.5.2023 in which the challenge was of classifying the accounts as "Red Flag Accounts" or "Fraud Accounts" in writ petition being Writ Petition (C) No. 306 of 2019 connected with other petitions. The said order has been placed before the Court which is annexure no. 11 to the affidavit.

(8) The predicate offence since remains to see the charge sheet and the present matter is also to be tried together by the same court, there will be delay in the trial since charge sheet has not been submitted in the predicate offence and as such the trial cannot proceed.

(9) No fraud has been committed since the claim of the Bank for declaring the Company as "Wilful Defaulter" or its account as "Fraud" has been struck down by Hon'ble Delhi High Court.

(10) After release of the applicant on bail in the predicate offence the said order is not under challenge and has attained finality till date.

(11) Reliance has been placed on orders / judgments of the Apex Court to submit that subsequent to grant of bail to the accused in the predicate offence, he is entitled to bail, delay in trial violates the right of the accused under Article 21 of the Constitution of India, the period of detention of the accused also has to be considered, the twin conditions under Section 45 of PMLA imposing restraint of grant of bail to an accused is not absolute, the grant of bail is a rule whereas jail is an exception and that the principle of law of bail is not to be withheld as a punishment. The following judgments / orders of the Apex Court have been placed for the same before the Court:

A. In the case of **V. Senthil Balaji v. Deputy Director, Directorate of Enforcement : 2024 SCC OnLine SC**

**2626** the Apex Court has been held as under:

**"EFFECT OF THE DELAY IN DISPOSAL OF THE CASES**

**14. As of now, the appellant has been incarcerated for more than 15 months in connection with the offence punishable under Section 4 of the PMLA**. The minimum punishment for an offence punishable under Section 4 is imprisonment for three years, which may extend to seven years. If the scheduled offences are under paragraph 2 of Part A of the Schedule in the PMLA, the sentence may extend to 10 years. In the appellant's case, the maximum sentence can be of 7 years as there is no scheduled offence under paragraph 2 of Part A of Schedule II alleged against the appellant.

15. We have already narrated that there are three scheduled offences. In the main case (CC Nos. 22 and 24 of 2021), there are about 2000 accused and 550 prosecution witnesses cited. Thus, it can be said that there are more than 2000 accused in the three scheduled offences, and the number of witnesses proposed to be examined exceeds 600.

16. This Bench is also dealing with MA no. 1381 of 2024 seeking various reliefs such as a transfer of investigation of scheduled offences, appointment of special public prosecutor etc. The orders passed in the said application would reveal that the sanction to prosecute all public servants, including the appellant, has now been granted. Charges have not been framed in the scheduled offences.

17. Thus, on the issue of framing of charge or discharge, a large number of accused will have to be heard. The trial of the scheduled offences will be a warrant case. Therefore, even if the trials of the scheduled offences are expedited, the process of framing charges may take a few months as many advocates representing more than 2000 accused persons will have to be heard. There are bound to be further proceedings arising out of orders on charge. After that, more than 600 witnesses will have to be examined. Documentary and electronic evidence is relied upon in the scheduled offences. Even if few witnesses are dropped, a few hundred witnesses will have to be examined. Presence of all the accused will have to be procured and their statements under Section 313 of the Criminal Procedure Code, 1973 will have to be recorded. Therefore, even in ideal conditions, the possibility of the trial of scheduled offences concluding even within a reasonable time of three to four years appears to be completely ruled out.

18. In the offence under the PMLA, the charge has not been framed. In view of Clause (d) of sub-section (1) of Section 44 of PMLA, the procedure for sessions trial will have to be followed for the prosecution of an offence punishable under Section 4 of the PMLA. In view of clause (c) of sub-section (1) of Section 44, it is possible to transfer the trial of the scheduled offences to the Special Court under the PMLA.

19. The offence of money laundering has been defined under Section 3 of the PMLA which reads thus:

**"3. Offence of money-laundering**.—Whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the [proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming] it as untainted property shall be guilty of offence of money-laundering.

[Explanation.—For the removal of doubts, it is hereby clarified that,—

(i) a person shall be guilty of offence of money-laundering if such person is found to have directly or indirectly attempted to indulge or knowingly assisted or knowingly is a party or is actually involved in one or more of the following processes or activities connected with proceeds of crime, namely:—

(a) concealment; or

(b) possession; or

(c) acquisition; or

(d) use; or

(e) projecting as untainted property; or

(f) claiming as untainted property, in any manner whatsoever;

(ii) the process or activity connected with proceeds of crime is a continuing activity and continues till such time a person is directly or indirectly enjoying the proceeds of crime by its concealment or possession or acquisition or use or projecting it as untainted property or claiming it as untainted property in any manner whatsoever.]

**20. Existence of proceeds of crime is a condition precedent for the offence under Section 3.** Proceeds of crime have been defined in Section 2(u) of the PMLA which reads thus:

"2

……

(u) "proceeds of crime" means any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property or where such property is taken or held outside the country, then the property equivalent in value held within the country [or abroad];

Explanation.—For the removal of doubts, it is hereby clarified that "proceeds of crime" include property not only derived or obtained from the scheduled offence but also any property which may directly or indirectly be derived or obtained as a result of any criminal activity relatable to the scheduled offence;"

21. Hence, the existence of a scheduled offence is sine qua non for alleging the existence of proceeds of crime. A property derived or obtained, directly or indirectly, by a person as a result of the criminal activity relating to a scheduled offence constitutes proceeds of crime. The existence of proceeds of crime at the time of the trial of the offence under Section 3 of PMLA can be proved only if the scheduled offence is established in the prosecution of the scheduled offence. Therefore, **even if the trial of the case under the PMLA proceeds, it cannot be finally decided unless the trial of scheduled offences concludes. In the facts of the case, there is no possibility of the trial of the scheduled offences commencing in the near future. Therefore, we see no possibility of both trials concluding within a few years.**

22. In the case of K.A. Najeeb, (2021) 3 SCC 713, in paragraph 17 this Court held thus:

"17. It is thus clear to us that the presence of statutory restrictions like Section 43-D(5) of the UAPA per se does not oust the ability of the constitutional courts to grant bail on grounds of violation of Part III of the Constitution. Indeed, both the restrictions under a statute as well as the powers exercisable under constitutional jurisdiction can be well harmonised. **Whereas at commencement of proceedings, the courts are expected to appreciate the legislative policy against grant of bail but the rigours of such provisions will melt down where there is no likelihood of trial being completed within a reasonable time and the period of incarceration already undergone has**

**exceeded a substantial part of the prescribed sentence. Such an approach would safeguard against the possibility of provisions like Section 43-D(5) of the UAPA being used as the sole metric for denial of bail or for wholesale breach of constitutional right to speedy trial."**

(emphasis added)

23. In the case of *Manish Sisodia v. Directorate of Enforcement, 2024 SCC OnLine SC 1920* in paragraphs 49 to 57, this Court held thus:

**"49. We find that, on account of a long period of incarceration running for around 17 months and the trial even not having been commenced, the appellant has been deprived of his right to speedy trial.**

50. As observed by this Court, the right to speedy trial and the right to liberty are sacrosanct rights. On denial of these rights, the trial court as well as the High Court ought to have given due weightage to this factor.

51. Recently, this Court had an occasion to consider an application for bail in the case of Javed *Gulam Nabi Shaikh v. State of Maharashtra* wherein the accused was prosecuted under the provisions of the Unlawful Activities (Prevention) Act, 1967. This Court surveyed the entire law right from the judgment of this Court in the cases of *Gudikanti Narasimhulu v. Public Prosecutor, High Court of Andhra Pradesh, Shri Gurbaksh Singh Sibbia v. State of Punjab, Hussainara Khatoon (I) v. Home Secretary, State of Bihar, Union of India v. K.A. Najeeb* and *Satender Kumar Antil v. Central Bureau of Investigation.* The Court observed thus:

"19. If the State or any prosecuting agency including the court concerned has no wherewithal to provide or protect the fundamental right of an accused to have a speedy trial as enshrined under Article 21 of the Constitution then the State or any other prosecuting agency should not oppose the plea for bail on the ground that the crime committed is serious. Article 21 of the Constitution applies irrespective of the nature of the crime."

52. The Court also reproduced the observations made in *Gudikanti Narasimhulu (supra)*, which read thus:

"10. In the aforesaid context, we may remind the trial courts and the High Courts of what came to be observed by this Court in *Gudikanti Narasimhulu v. Public Prosecutor, High Court, (1978) 1 SCC 240.* We quote:

*"What is often forgotten, and therefore warrants reminder, is the object to keep a person in judicial custody pending trial or disposal of an appeal. Lord Russel, C.J., said [R v. Rose, (1898) 18 Cox]:*

*"I observe that in this case bail was refused for the prisoner. It cannot be too strongly impressed on the, magistracy of the country that bail is not to be withheld as a punishment, but that the requirements as to bail are merely to secure the attendance of the prisoner at trial.""*

**53. The Court further observed that, over a period of time, the trial courts and the High Courts have forgotten a very well-settled principle of law that bail is not to be withheld as a punishment.** From our experience, we can say that it appears that the trial courts and the High Courts attempt to play safe in matters of grant of bail. The principle that bail is a rule and refusal is an exception is, at times, followed in breach. On account of non-grant of bail even in straight forward open and shut cases, this Court is flooded with huge number of bail petitions thereby adding to the huge pendency. It is high time that the trial courts and the High Courts

should recognize the principle that "bail is rule and jail is exception".

**54. In the present case, in the ED matter as well as the CBI matter, 493 witnesses have been named. The case involves thousands of pages of documents and over a lakh pages of digitized documents. It is thus clear that there is not even the remotest possibility of the trial being concluded in the near future. In our view, keeping the appellant behind the bars for an unlimited period of time in the hope of speedy completion of trial would deprive his fundamental right to liberty under Article 21 of the Constitution. As observed time and again, the prolonged incarceration before being pronounced guilty of an offence should not be permitted to become punishment without trial.**

55. As observed by this Court in the case of *Gudikanti Narasimhulu (supra),* the objective to keep a person in judicial custody pending trial or disposal of an appeal is to secure the attendance of the prisoner at trial.

56. In the present case, the appellant is having deep roots in the society. There is no possibility of him fleeing away from the country and not being available for facing the trial. In any case, conditions can be imposed to address the concern of the State.

57. Insofar as the apprehension given by the learned ASG regarding the possibility of tampering the evidence is concerned, it is to be noted that the case largely depends on documentary evidence which is already seized by the prosecution. As such, there is no possibility of tampering with the evidence. Insofar as the concern with regard to influencing the witnesses is concerned, the said concern can be addressed by imposing stringent conditions upon the appellant.

…….

" (emphasis added)

24. There are a few penal statutes that make a departure from the provisions of Sections 437, 438, and 439 of the Criminal Procedure Code, 1973. A higher threshold is provided in these statutes for the grant of bail. By way of illustration, we may refer to Section 45(1)(ii) of PMLA, proviso to Section 43D(5) of the Unlawful Activities (Prevention) Act, 1967 and Section 37 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, 'NDPS Act'). The provisions regarding bail in some of such statutes start with a nonobstante clause for overriding the provisions of Sections 437 to 439 of the CrPC. The legislature has done so to secure the object of making the penal provisions in such enactments. For example, the PMLA provides for Section 45(1)(ii) as money laundering poses a serious threat not only to the country's financial system but also to its integrity and sovereignty.

25. Considering the gravity of the offences in such statutes, expeditious disposal of trials for the crimes under these statutes is contemplated. Moreover, such statutes contain provisions laying down higher threshold for the grant of bail. **The expeditious disposal of the trial is also warranted considering the higher threshold set for the grant of bail.** Hence, the requirement of expeditious disposal of cases must be read into these statutes. **Inordinate delay in the conclusion of the trial and the higher threshold for the grant of bail cannot go together. It is a well-settled principle of our criminal jurisprudence that "bail is the rule, and jail is the exception." These stringent provisions regarding the grant of bail,**

**such as Section 45(1)(iii) of the PMLA, cannot become a tool which can be used to incarcerate the accused without trial for an unreasonably long time.**

26. There are a series of decisions of this Court starting from the decision in the case of **K.A. Najeeb, which hold that such stringent provisions for the grant of bail do not take away the power of Constitutional Courts to grant bail on the grounds of violation of Part III of the Constitution of India.** We have already referred to paragraph 17 of the said decision, which lays down that the rigours of such provisions will melt down where there is no likelihood of trial being completed in a reasonable time and the period of incarceration already undergone has exceeded a substantial part of the prescribed sentence. One of the reasons is that if, because of such provisions, incarceration of an undertrial accused is continued for an unreasonably long time, the provisions may be exposed to the vice of being violative of Article 21 of the Constitution of India.

27. Under the Statutes like PMLA, the minimum sentence is three years, and the maximum is seven years. The minimum sentence is higher when the scheduled offence is under the NDPS Act. **When the trial of the complaint under PMLA is likely to prolong beyond reasonable limits, the Constitutional Courts will have to consider exercising their powers to grant bail. The reason is that Section 45(1)(ii) does not confer power on the State to detain an accused for an unreasonably long time, especially when there is no possibility of trial concluding within a reasonable time**. What a reasonable time is will depend on the provisions under which the accused is being tried and other factors. **One of the most relevant factor is the duration of the minimum and maximum sentence for the offence.** Another important consideration is the higher threshold or stringent conditions which a statute provides for the grant of bail. Even an outer limit provided by the relevant law for the completion of the trial, if any, is also a factor to be considered. The extraordinary powers, as held in the case of *K.A. Najeeb*, can only be exercised by the Constitutional Courts. The Judges of the Constitutional Courts have vast experience. **Based on the facts on record, if the Judges conclude that there is no possibility of a trial concluding in a reasonable time, the power of granting bail can always be exercised by the Constitutional Courts on the grounds of violation of Part III of the Constitution of India notwithstanding the statutory provisions.** The Constitutional Courts can always exercise its jurisdiction under Article 32 or Article 226, as the case may be. **The Constitutional Courts have to bear in mind while dealing with the cases under the PMLA that, except in a few exceptional cases, the maximum sentence can be of seven years. The Constitutional Courts cannot allow provisions like Section 45(1)(ii) to become instruments in the hands of the ED to continue incarceration for a long time when there is no possibility of a trial of the scheduled offence and the PMLA offence concluding within a reasonable time. If the Constitutional Courts do not exercise their jurisdiction in such cases, the rights of the undertrials under Article 21 of the Constitution of India will be defeated. In a given case, if an undue delay in the disposal of the trial of scheduled offences or disposal of trial under the PMLA can be substantially attributed to the accused, the Constitutional Courts can always decline to exercise jurisdiction to**

**issue prerogative writs.** An exception will also be in a case where, considering the antecedents of the accused, there is every possibility of the accused becoming a real threat to society if enlarged on bail. The jurisdiction to issue prerogative writs is always discretionary.

28. Some day, the courts, especially the Constitutional Courts, will have to take a call on a peculiar situation that arises in our justice delivery system. There are cases where clean acquittal is granted by the criminal courts to the accused after very long incarceration as an undertrial. When we say clean acquittal, we are excluding the cases where the witnesses have turned hostile or there is a bona fide defective investigation. In such cases of clean acquittal, crucial years in the life of the accused are lost. **In a given case, it may amount to violation of rights of the accused under Article 21 of the Constitution which may give rise to a claim for compensation.**

**29. As stated earlier, the appellant has been incarcerated for 15 months or more for the offence punishable under the PMLA. In the facts of the case, the trial of the scheduled offences and, consequently, the PMLA offence is not likely to be completed in three to four years or even more. If the appellant's detention is continued, it will amount to an infringement of his fundamental right under Article 21 of the Constitution of India of speedy trial."**

B. In the case of **Arvind Kejriwal v. Central Bureau of Investigation : 2024 SCC OnLine SC 2550** the Apex Court has held as under:

"38. The evolution of bail jurisprudence in India underscores that the 'issue of bail is one of liberty, justice, public safety and burden of the public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitised judicial process'. **The principle has further been expanded to establish that the prolonged incarceration of an accused person, pending trial, amounts to an unjust deprivation of personal liberty.** This Court in *Union of India v. K.A. Najeeb* has expanded this principle even in a case under the provisions of the Unlawful Activities (Prevention) Act, 1967 **(hereinafter 'UAPA')** notwithstanding the statutory embargo contained in Section 43-D(5) of that Act, laying down that the legislative policy **against the grant of bail will melt down where there is no likelihood of trial being completed within a reasonable time. The courts would invariably bend towards 'liberty' with a flexible approach towards an undertrial,** save and except when the release of such person is likely to shatter societal aspirations, derail the trial or deface the very criminal justice system which is integral to rule of law."

C. In the case of **Prem Prakash v. Union of India through the Directorate of Enforcement : 2024 SCC OnLine SC 2270** the Apex Court has held as under:

"9. The appellant was taken into custody on 11.08.2023. He was already in custody from 25.08.2022 in ECIR No. 4 of 2022. His application for bail was rejected by the Special Judge on 20.09.2023. He preferred a bail application before the High Court. The High Court has declined bail to the appellant. Aggrieved, the appellant is before us.

10. We have heard Mr. Ranjit Kumar, Learned Senior counsel for the appellant, ably assisted by Mr. Indrajit Sinha and Mr. Siddharth Naidu, learned advocates. We have also heard Mr. S.V. Raju, Learned Additional Solicitor General,

ably assisted by Mr. Zoheb Hussain and Mr. Kanu Agarwal for the respondents. Learned Senior Counsels on both sides have placed their respective contentions and also filed detailed written submissions.

**SECTION 45 PMLA-CONTOURS**

11. Considering that the present is a bail application for the offence under Section 45 of PMLA, the twin conditions mentioned thereof become relevant. Section 45(1) of PMLA reads as under:—

**"45. Offences to be cognizable and non-bailable**. (1) Notwithstanding anything contained in the Criminal Procedure Code, 1973 (2 of 1974), no person accused of an offence [under this Act] shall be released on bail or on his own bond unless-

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release; and

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

Provided that a person, who, is under the age of sixteen years, or is a woman or is sick or infirm or is accused either on his own or along with other co-accused of money-laundering a sum of less than one crore rupees, may be released on bail, if the Special Court so directs:

Provided further that the Special Court shall not take cognizance of any offence punishable under Section 4 except upon a complaint in writing made by-

(i) the Director; or

(ii) any officer of the Central Government or a State Government authorised in writing in this behalf by the Central Government by a general or special order made in this behalf by that Government."

In *Vijay Madanlal Choudhary v. Union of India, 2022 SCC OnLine SC* 929, this Court categorically held that while **Section 45 of PMLA restricts the right of the accused to grant of bail, it could not be said that the conditions provided under Section 45 impose absolute restraint on the grant of bail.** Para 131 is extracted hereinbelow:—

"131. It is important to note that the twin conditions provided under Section 45 of the 2002 Act, though restrict the right of the accused to grant of bail, **but it cannot be said that the conditions provided under Section 45 impose absolute restraint on the grant of bail.** The discretion vests in the court, which is not arbitrary or irrational but judicial, guided by the principles of law as provided under Section 45 of the 2002 Act. …"

These observations are significant and if read in the context of the recent pronouncement of this Court dated 09.08.2024 in Criminal Appeal No. 3295 of 2024 *[Manish Sisodia (II) v. Directorate of Enforcement],* it will be amply clear that even under PMLA the governing principle is that ***"Bail is the Rule and Jail is the Exception".*** In para 53 of ***[Manish Sisodia (II),*** this Court observed as under:—

"53…..From our experience, we can say that it appears that the trial courts and the High Courts attempt to play safe in matters of grant of bail. The principle that bail is a rule and refusal is an exception is, at times, followed in breach. On account of non-grant of bail even in straight forward open and shut cases, this Court is flooded with huge number of bail petitions thereby adding to the huge pendency. **It is high time that the trial courts and the High Courts should recognize the principle that "bail is rule and jail is exception."**

All that Section 45 of PMLA mentions is that certain conditions are to be satisfied. **The principle that, "bail is the rule and jail is the exception" is only a paraphrasing of Article 21 of the Constitution of India, which states that no person shall be deprived of his life or personal liberty except according to the procedure established by law. Liberty of the individual is always a Rule and deprivation is the exception. Deprivation can only be by the procedure established by law, which has to be a valid and reasonable procedure.** Section 45 of PMLA by imposing twin conditions does not re-write this principle to mean that deprivation is the norm and liberty is the exception. **As set out earlier, all that is required is that in cases where bail is subject to the satisfaction of twin conditions, those conditions must be satisfied.**

12. Independently and as has been emphatically reiterated in *Manish Sisodia (II) (supra) relying on Ramkripal Meena v. Directorate of Enforcement* (SLP (Crl.) No. 3205 of 2024 dated 30.07.2024) and Javed Gulam Nabi Shaikh v. State of Maharashtra, 2024 SCC OnLine SC 1693, **where the accused has already been in custody for a considerable number of months and there being no likelihood of conclusion of trial within a short span, the rigours of Section 45 of PMLA can be suitably relaxed to afford conditional liberty.** Further, *Manish Sisodia (II) (supra) reiterated the holding in Javed Gulam Nabi Sheikh (Supra),* that keeping persons behind the bars for unlimited periods of time in the hope of speedy completion of trial would deprive the fundamental right of persons under Article 21 of the Constitution of India and that prolonged incarceration before being pronounced guilty ought not to be permitted to become the punishment without trial. In fact, *Manish Sisodia (II) (Supra)* reiterated the holding in *Manish Sisodia (I) v. Directorate of Enforcement* (judgment dated 30.10.2023 in Criminal Appeal No. 3352 of 2023) where it was held as under:—

"28. Detention or jail before being pronounced guilty of an offence should not become punishment without trial. **If the trial gets protracted despite assurances of the prosecution, and it is clear that case will not be decided within a foreseeable time, the prayer for bail may be meritorious.** While the prosecution may pertain to an economic offence, yet it may not be proper to equate these cases with those punishable with death, imprisonment for life, ten years or more like offences under the Narcotic Drugs and Psychotropic Substances Act, 1985, murder, cases of rape, dacoity, kidnaping for ransom, mass violence, etc. Neither is this a case where 100/1000s of depositors have been defrauded. The allegations have to be established and proven. **The right to bail in cases of delay, coupled with incarceration for a long period, depending on the nature of the allegations, should be read into Section 439 of the Code and Section 45 of the PML Act. The reason is that the constitutional mandate is the higher law, and it is the basic right of the person charged of an offence and not convicted, that he be ensured and given a speedy trial. When the trial is not proceeding for reasons not attributable to the accused, the court, unless there are good reasons, may well be guided to exercise the power to grant bail. This would be truer where the trial would take years."**

**It is in this background that Section 45 of PMLA needs to be understood and applied. Article 21 being**

**a higher constitutional right, statutory provisions should align themselves to the said higher constitutional edict."**

D. In the case of **Jalaluddin Khan v. Union of India : 2024 SCC OnLine SC 1945** the Apex Court held as under:

"18. Now, we come to Section 20 of UAPA, which reads thus:

**"20. Punishment for being member of terrorist gang or organisation.—** Any person who is a member of a terrorist gang or a terrorist organisation, which is involved in terrorist act, shall be punishable with imprisonment for a term which may extend to imprisonment for life, and shall also be liable to fine."

Terrorist gang has been defined in Section 2(L), which reads thus:

**"2 Definitions.—**

**…….**

(L) "terrorist gang" means any association, other than terrorist organisation, whether systematic or otherwise, which is concerned with, or involved in, terrorist act;

…….

……."

There is not even an allegation in the charge sheet that the appellant was a member of any terrorist gang. As regards the second part of being a member of a terrorist organisation, as per Section 2(m), a terrorist organisation means an organisation listed in the first schedule or an organisation operating under the same name as the organisation was listed. The charge sheet does not mention the name of the terrorist organisation within the meaning of Section 2(m) of which the appellant was a member. We find that the PFI is not a terrorist organisation, as is evident from the first schedule.

19. Therefore, on plain reading of the charge sheet, it is not possible to record a conclusion that there are reasonable grounds for believing that the accusation against the appellant of commission of offences punishable under the UAPA is prima facie true. We have taken the charge sheet and the statement of witness Z as they are without conducting a mini-trial. Looking at what we have held earlier, it is impossible to record a *prima facie* finding that there were reasonable grounds for believing that the accusation against the appellant of commission of offences under the UAPA was prima facie true. No antecedents of the appellant have been brought on record.

20. The upshot of the above discussion is that there was no reason to reject the bail application filed by the appellant.

21. Before we part with the Judgment, we must mention here that the Special Court and the High Court did not consider the material in the charge sheet objectively. Perhaps the focus was more on the activities of PFI, and therefore, the appellant's case could not be properly appreciated. **When a case is made out for a grant of bail, the Courts should not have any hesitation in granting bail. The allegations of the prosecution may be very serious. But, the duty of the Courts is to consider the case for grant of bail in accordance with the law. "Bail is the rule and jail is an exception" is a settled law. Even in a case like the present case where there are stringent conditions for the grant of bail in the relevant statutes, the same rule holds good with only modification that the bail can be granted if the conditions in the statute are satisfied. The rule also means that once a case is made out for the grant of bail, the Court cannot decline to grant bail. If the**

**Courts start denying bail in deserving cases, it will be a violation of the rights guaranteed under Article 21 of our Constitution."**

E. In the case of **Manish Sisodia v. Directorate of Enforcement : 2024 SCC OnLine SC 1920** the Apex Court has held as under:

"49. We find that, on account of a long period of incarceration running for around 17 months and the trial even not having been commenced, the appellant has been deprived of his right to speedy trial.

50. As observed by this Court, the right to speedy trial and the right to liberty are sacrosanct rights. On denial of these rights, the trial court as well as the High Court ought to have given due weightage to this factor.

51. Recently, this Court had an occasion to consider an application for bail in the case of *Javed Gulam Nabi Shaikh v. State of Maharashtra* wherein the accused was prosecuted under the provisions of the Unlawful Activities (Prevention) Act, 1967. This Court surveyed the entire law right from the judgment of this Court in the cases of *Gudikanti Narasimhulu v. Public Prosecutor, High Court of Andhra Pradesh, Shri Gurbaksh Singh Sibbia v. State of Punjab, Hussainara Khatoon (I) v. Home Secretary, State of Bihar, Union of India v. K.A. Najeeb and Satender Kumar Antil v. Central Bureau of Investigation.* The Court observed thus:

**"19. If the State or any prosecuting agency including the court concerned has no wherewithal to provide or protect the fundamental right of an accused to have a speedy trial as enshrined under Article 21 of the Constitution then the State or any other prosecuting agency should not oppose the plea for bail on the ground that the crime committed is serious. Article 21 of the Constitution applies irrespective of the nature of the crime."**

52. The Court also reproduced the observations made in *Gudikanti Narasimhulu (supra),* which read thus:

"10. In the aforesaid context, we may remind the trial courts and the High Courts of what came to be observed by this Court in *Gudikanti Narasimhulu v. Public Prosecutor,* High Court reported in (1978) 1 SCC 240. We quote:

*"What is often forgotten, and therefore warrants reminder, is the object to keep a person in judicial custody pending trial or disposal of an appeal. Lord Russel, C.J., said [R v. Rose, (1898) 18 Cox]:*

*"I observe that in this case bail was refused for the prisoner. It cannot be too strongly impressed on the, magistracy of the country that bail is not to be withheld as a punishment, but that the requirements as to bail are merely to secure the attendance of the prisoner at trial.""*

**53. The Court further observed that, over a period of time, the trial courts and the High Courts have forgotten a very well-settled principle of law that bail is not to be withheld as a punishment. From our experience, we can say that it appears that the trial courts and the High Courts attempt to play safe in matters of grant of bail. The principle that bail is a rule and refusal is an exception is, at times, followed in breach.** On account of non-grant of bail even in straight forward open and shut cases, this Court is flooded with huge number of bail petitions thereby adding to the huge pendency. **It is high time that the trial courts and the High Courts should recognize the principle that "bail is rule and jail is exception".**

54. In the present case, in the ED matter as well as the CBI matter, 493

witnesses have been named. The case involves thousands of pages of documents and over a lakh pages of digitized documents. **It is thus clear that there is not even the remotest possibility of the trial being concluded in the near future. In our view, keeping the appellant behind the bars for an unlimited period of time in the hope of speedy completion of trial would deprive his fundamental right to liberty under Article 21 of the Constitution**. As observed time and again, the prolonged incarceration before being pronounced guilty of an offence should not be permitted to become punishment without trial.

55. As observed by this Court in the case of *Gudikanti Narasimhulu (supra),* **the objective to keep a person in judicial custody pending trial or disposal of an appeal is to secure the attendance of the prisoner at trial."**

E. In the case of **Ramkripal Meena v. Directorate of Enforcement : 2024 SCC OnLine SC 2276** the Apex Court has held as under:

"7. Adverting to the prayer for grant of bail in the instant case, it is pointed out by learned counsel for ED that **the complaint case is at the stage of framing of charges** and 24 witnesses are proposed to be examined. The conclusion of proceedings, thus, will take some reasonable time. **The petitioner has already been in custody for more than a year. Taking into consideration the period spent in custody and there being no likelihood of conclusion of trial within a short span, coupled with the fact that the petitioner is already on bail in the predicate offence, and keeping in view the peculiar facts and circumstances of this case, it seems to us that the rigours of Section 45 of the Act can be suitably relaxed to afford conditional liberty to the petitioner.** Ordered accordingly.

8. In view of the above and without expressing any views on the merits of the case, we are inclined to release the petitioner on bail. The petitioner is, accordingly, directed to be enlarged on bail subject to such terms and conditions as may be imposed by the learned Special Judge. In addition, the petitioner shall abide by the following conditions:

(i) If the passport of the petitioner is still with him, the same shall be deposited with the Special Court.

(ii) The petitioner shall not make any direct or indirect attempt to contact the witnesses, who are likely to depose against him.

(iii) The petitioner shall not indulge in tampering of the evidence and any such attempt by him shall be taken as a misuse of concession of this bail order.

(iv) The petitioner shall furnish a fresh list of immovable assets owned by him and his family and the ED shall be at liberty to attach all such assets. The bank account of the petitioner shall also remain seized.

(v) The petitioner shall appear before the Trial Court regularly and in the event he is found absent, the ED shall be at liberty to seek cancellation of bail granted to him today by this Court."

F. In the case of **Sk. Javed Iqbal v. State of U.P. : (2024) 8 SCC 293** the Apex Court has held as under:

"41. In Gurwinder Singh [Gurwinder Singh v. State of Punjab, (2024) 5 SCC 403 : (2024) 2 SCC (Cri) 676] on which reliance has been placed by the respondent, a two-Judge Bench of this Court distinguished K.A. Najeeb [Union of India v. K.A. Najeeb, (2021) 3 SCC 713] holding that the appellant in K.A. Najeeb [Union of India v. K.A. Najeeb, (2021) 3

SCC 713] was in custody for five years and that the trial of the appellant in that case was severed from the other co-accused whose trial had concluded whereupon they were sentenced to imprisonment of eight years; but in Gurwinder Singh [Gurwinder Singh v. State of Punjab, (2024) 5 SCC 403 : (2024) 2 SCC (Cri) 676], the trial was already underway and that twenty-two witnesses including the protected witnesses have been examined. It was in that context, the two-Judge Bench of this Court in Gurwinder Singh [Gurwinder Singh v. State of Punjab, (2024) 5 SCC 403 : (2024) 2 SCC (Cri) 676] observed that mere delay in trial pertaining to grave offences cannot be used as a ground to grant bail.

42. **This Court has, time and again, emphasised that right to life and personal liberty enshrined under Article 21 of the Constitution of India is overarching and sacrosanct. A constitutional court cannot be restrained from granting bail to an accused on account of restrictive statutory provisions in a penal statute if it finds that the right of the accused-undertrial under Article 21of the Constitution of India has been infringed.** In that event, such statutory restrictions would not come in the way. **Even in the case of interpretation of a penal statute, howsoever stringent it may be, a constitutional court has to lean in favour of constitutionalism and the rule of law of which liberty is an intrinsic part.** In the given facts of a particular case, a constitutional court may decline to grant bail. **But it would be very wrong to say that under a particular statute, bail cannot be granted.** It would run counter to the very grain of our constitutional jurisprudence. In any view of the matter, K.A. Najeeb [Union of India v. K.A. Najeeb, (2021) 3 SCC 713] being rendered by a three-Judge Bench is binding on a Bench of two Judges like us."

G. In the case of **Javed Gulam Nabi Shaikh v. State of Maharashtra and Another : 2024 SCC OnLine SC 1693** the Apex Court has held as under:

"8. Having regard to the aforesaid, we wonder by what period of time, the trial will ultimately conclude. Howsoever serious a crime may be, *an accused has a right to speedy trial as enshrined under the Constitution of India.*

9. Over a period of time, the trial courts and the High Courts have forgotten a very well settled principle of law that bail is not to be withheld as a punishment.

10. In the aforesaid context, we may remind the trial courts and the High Courts of what came to be observed by this Court in *Gudikanti Narasimhulu v. Public Prosecutor,* High Court reported in (1978) 1 SCC 240. We quote:

*"What is often forgotten, and therefore warrants reminder, is the object to keep a person in judicial custody pending trial or disposal of an appeal. Lord Russel, C.J., said [R v. Rose, (1898) 18 Cox]:*

*"I observe that in this case bail was refused for the prisoner. It cannot be too strongly impressed on the, magistracy of the country that bail is not to be withheld as a punishment, but that the requirements as to bail are merely to secure the attendance of the prisoner at trial."*

11. The same principle has been reiterated by this Court in *Gurbaksh Singh Sibba v. State of Punjab,* (1980) 2 SCC 565 that the object of bail is to secure the attendance of the accused at the trial, that the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial

and that it is indisputable that bail is not to be withheld as a punishment.

12. Long back, in *Hussainara Khatoon v. Home Secy., State of Bihar*, (1980) 1 SCC 81, this court had declared that the right to speedy trial of offenders facing criminal charges is "implicit in the broad sweep and content of Article 21 as interpreted by this Court". Remarking that a valid procedure under Article 21 is one which contains a procedure that is "reasonable, fair and just" it was held that:

*"Now obviously procedure prescribed by law for depriving a person of liberty cannot be "reasonable, fair or just" unless that procedure ensures a speedy trial for determination of the guilt of such person. No procedure which does not ensure a reasonably quick trial can be regarded as "reasonable, fair or just" and it would fall foul of Article 21. There can, therefore, be no doubt that speedy trial, and by speedy trial we mean reasonably expeditious trial, is an integral and essential part of the fundamental right to life and liberty enshrined in Article 21. The question which would, however, arise is as to what would be the consequence if a person accused of an offence is denied speedy trial and is sought to be deprived of his liberty by imprisonment as a result of a long delayed trial in violation of his fundamental right under Article 21."*

13. The aforesaid observations have resonated, time and again, in several judgments, such as *Kadra Pahadiya v. State of Bihar, (1981) 3 SCC 671 and Abdul Rehman Antulay v. R.S. Nayak,* (1992) 1 SCC 225. In the latter the court re-emphasized the right to speedy trial, and further held that an accused, facing prolonged trial, has no option:

*"The State or complainant prosecutes him. It is, thus, the obligation of the State or the complainant, as the case may be, to proceed with the case with reasonable promptitude. Particularly, in this country, where the large majority of accused come from poorer and weaker sections of the society, not versed in the ways of law, where they do not often get competent legal advice, the application of the said rule is wholly inadvisable. Of course, in a given case, if an accused demands speedy trial and yet he is not given one, may be a relevant factor in his favour. But we cannot disentitle an accused from complaining of infringement of his right to speedy trial on the ground that he did not ask for or insist upon a speedy trial."*

14. In *Mohd Muslim @ Hussain v. State (NCT of Delhi),* 2023 INSC 311, this Court observed as under:

*"21. Before parting, it would be important to reflect that laws which impose stringent conditions for grant of bail, may be necessary in public interest; yet, if trials are not concluded in time, the injustice wrecked on the individual is immeasurable. Jails are overcrowded and their living conditions, more often than not, appalling. According to the Union Home Ministry's response to Parliament, the National Crime Records Bureau had recorded that as on 31st December 2021, over 5,54,034 prisoners were lodged in jails against total capacity of 4,25,069 lakhs in the country. Of these 122,852 were convicts; the rest 4,27,165 were undertrials.*

*22. The danger of unjust imprisonment, is that inmates are at risk of "prisonisation" a term described by the Kerala High Court in A Convict Prisoner v. State, 1993 Cri LJ 3242, as "a radical transformation" whereby the prisoner:*

*"loses his identity. He is known by a number. He loses personal possessions. He has no personal relationships. Psychological problems*

*result from loss of freedom, status, possessions, dignity any autonomy of personal life. The inmate culture of prison turns out to be dreadful. The prisoner becomes hostile by ordinary standards. Self-perception changes."*

*23. There is a further danger of the prisoner turning to crime, "as crime not only turns admirable, but the more professional the crime, more honour is paid to the criminal" (also see Donald Clemmer's 'The Prison Community' published in 1940). Incarceration has further deleterious effects - where the accused belongs to the weakest economic strata : immediate loss of livelihood, and in several cases, scattering of families as well as loss of family bonds and alienation from society. The courts therefore, have to be sensitive to these aspects (because in the event of an acquittal, the loss to the accused is irreparable), and ensure that trials - especially in cases, where special laws enact stringent provisions, are taken up and concluded speedily."*

15. The requirement of law as being envisaged under Section 19 of the National Investigation Agency Act, 2008 (hereinafter being referred to as "the 2008 Act") mandates that the trial under the Act of any offence by a Special Court shall be held on day-to-day basis on all working days and have precedence over the trial of any other case and Special Courts are to be designated for such an offence by the Central Government in consultation with the Chief Justice of the High Court as contemplated under Section 11 of the 2008.

16. A three-Judge Bench of this Court in *Union of India v. K.A. Najeeb,* (2021) 3 SCC 713] had an occasion to consider the long incarceration and at the same time the effect of Section 43-D(5) of the UAP Act and observed as under : (SCC p. 722, para 17)

*"17. It is thus clear to us that the presence of statutory restrictions like Section 43-D(5) of the UAPA per se does not oust the ability of the constitutional courts to grant bail on grounds of violation of Part III of the Constitution. Indeed, both the restrictions under a statute as well as the powers exercisable under constitutional jurisdiction can be well harmonised. Whereas at commencement of proceedings, the courts are expected to appreciate the legislative policy against grant of bail but the rigours of such provisions will melt down where there is no likelihood of trial being completed within a reasonable time and the period of incarceration already undergone has exceeded a substantial part of the prescribed sentence. Such an approach would safeguard against the possibility of provisions like Section 43-D(5) of the UAPA being used as the sole metric for denial of bail or for wholesale breach of constitutional right to speedy trial."*

17. In the recent decision, *Satender Kumar Antil v. Central Bureau of Investigation,* (2022) 10 SCC 51, prolonged incarceration and inordinate delay engaged the attention of the court, which considered the correct approach towards bail, with respect to several enactments, including Section 37 NDPS Act. The court expressed the opinion that Section 436A (which requires inter alia the accused to be enlarged on bail if the trial is not concluded within specified periods) of the Criminal Procedure Code, 1973 would apply:

*"We do not wish to deal with individual enactments as each special Act has got an objective behind it, followed by the rigour imposed. The general principle governing delay would apply to these categories also. To make it clear, the provision contained in Section 436-A of the Code would apply to the Special Acts also*

*in the absence of any specific provision. For example, the rigour as provided under Section 37 of the NDPS Act would not come in the way in such a case as we are dealing with the liberty of a person. We do feel that more the rigour, the quicker the adjudication ought to be. After all, in these types of cases number of witnesses would be very less and there may not be any justification for prolonging the trial. Perhaps there is a need to comply with the directions of this Court to expedite the process and also a stricter compliance of Section 309 of the Code."*

18. Criminals are not born out but made. The human potential in everyone is good and so, never write off any criminal as beyond redemption. This humanist fundamental is often missed when dealing with delinquents, juvenile and adult. Indeed, every saint has a past and every sinner a future. When a crime is committed, a variety of factors is responsible for making the offender commit the crime. Those factors may be social and economic, may be, the result of value erosion or parental neglect; may be, because of the stress of circumstances, or the manifestation of temptations in a milieu of affluence contrasted with indigence or other privations.

**19. If the State or any prosecuting agency including the court concerned has no wherewithal to provide or protect the fundamental right of an accused to have a speedy trial as enshrined under Article 21 of the Constitution then the State or any other prosecuting agency should not oppose the plea for bail on the ground that the crime committed is serious. Article 21 of the Constitution applies irrespective of the nature of the crime."**

G. In the case of **Shoma Kanti Sen v. State of Maharashtra : (2024) 6 SCC 591,** the Apex Court has held as under:

"46. Pre-conviction detention is necessary to collect evidence (at the investigation stage), to maintain purity in the course of trial and also to prevent an accused from being fugitive from justice. Such detention is also necessary to prevent further commission of offence by the same accused. Depending on gravity and seriousness of the offence alleged to have been committed by an accused, detention before conclusion of trial at the investigation and post charge-sheet stage has the sanction of law broadly on these reasonings. **But any form of deprival of liberty results in breach of Article 21 of the Constitution of India and must be justified on the ground of being reasonable, following a just and fair procedure and such deprival must be proportionate in the facts of a given case.** These would be the overarching principles which the law courts would have to apply while testing prosecution's plea of pre-trial detention, both at investigation and post charge-sheet stage."

H. In the case of **Sanjay Agarwal v. Directorate of Enforcement : 2022 SCC OnLine SC 1748** the Apex Court has held as under:

**"5. It appears that the appellant was admitted to regular bail in connection with the aforesaid offences punishable under the provisions of Customs Act vide order dated 28.08.2018.** Upon registration of the proceedings by the Enforcement Directorate on 03.02.2021, the appellant came to be arrested in said PMLA case on 28.11.2021 and has since then been in custody.

6. At this stage, we need not go into the submissions raised on behalf of either side. **The fact of the matter is that**

**for an offence where the maximum sentence could be punishable with imprisonment for seven years, the appellant has undergone custody for about a year.**

7. **It further appears that the investigation is still pending and the matter is not ripe for trial on merits before the appropriate Court.**

8. Considering the entirety of the circumstances on record and in the peculiar facts, in our view, the appellant is entitled to the relief of bail. We, therefore, proceed to pass following directions:

(a) The appellant shall be produced before the concerned Court within three days and the concerned Court shall release the appellant on bail subject to such conditions as the Court may deem it appropriate to impose.

(b) Such conditions shall include following stipulations-

(i) that the appellant shall swear an affidavit as to the details of the passport(s) held by him, which along with affidavit, shall be tendered before the Enforcement Directorate.

(c) The appellant upon being released on bail shall mark his presence in the office of the Enforcement Directorate every Monday between 11.00 am to 1.00 pm.

(d) The appellant shall not in any way hamper the investigation and/or seek to influence the course of investigation or the witnesses. Any such attempt or infraction in that behalf shall entail in cancellation of the relief granted vide this Order."

(12) The applicant is in jail since 07.02.2024 and therefore, he be released on bail.

6. Learned counsel for the Enforcement Directorate submitted as under:-

(1) The complaint under PMLA has been filed with regards to the proceeds of crime.

(2) After taking money from the bank the same was transferred to shell companies and then siphoned off.

(3) No joint trial is required as per Sections 44(1) (c) of Prevention of Money Laundering Act.

(4) There is no requirement of charge sheet in the predicate offence.

(5) The complaint particularly Table Nos. 6 to 13 clearly shows involvement of the applicant and the modus operandi.

(6) Prevention of Money Laundering Act lays down its twin conditions for grant of bail under Section 45 which is applicable and due to the same, bail is not liable to be granted to the applicant.

(7) The prayer for bail thus be rejected.

7. In rejoinder, learned counsel for the applicant submitted and reiterated as under:-

(1) No charge sheet has been submitted in the predicate offence.

(2) The statements of said two persons is of someone else which cannot be relied on.

(3) No investigation is needed in the present matter and as such custody is not needed.

(4) There are no chances of tempering with the evidence.

(5) Rigours of twin conditions under Section 45 of PML Act do not apply.

(6) It is a fit case for grant of bail.

8. After having heard learned counsels for the parties and perusing the records, it is evident that-

(1) The applicant is in custody in connection with an offence under Prevention of Money Laundering Act.

(2) In the predicate offence he has been granted bail. The said order stands final till date.

(3) No charge sheet has been submitted in the predicate offence with regards to the present issue being committed relating to Punjab National Bank till date.

(4) The law with regards to trial is clear and well settled.

(5) The case under PMLA and the predicate offence has to be tried together by the same court which is not possible in the present case as of now since predicate offence is yet to see its charge sheet, if any.

(6) The challenge to declaring M/s SVOGL Oil Gas & Energy Limited as "Wilful Defaulter" and its account as "Fraud" was successful and the same was struck down by Hon'ble Delhi High Court. The said order also attains finality.

(7) Custodial interrogation is not needed.

(8) The principle of "bail is a rule and jail is an exception" is being consistently followed and repeatedly being reiterated and reminded by the Apex Court and other Courts.

(9) The applicant is in jail since 07.02.2024.

(10) There are no chances of his absconding.

(11) Looking to the facts and circumstances of the case, it is a fit case for grant of bail.

9. Let the applicant- **Padam Singhee**, be released on bail in the aforesaid case crime number on furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned with the following conditions which are being imposed in the interest of justice:-

i) The applicant will not tamper with prosecution evidence.

ii) The applicant will abide the orders of court, will attend the court on every date and will not delay the disposal of trial in any manner whatsoever.

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

(iv) The applicant will not misuse the liberty of bail in any manner whatsoever. In case, the applicant misuses the liberty of bail during trial and in order to secure his presence proclamation under section 82 Cr.P.C., may be issued and if applicant fails to appear before the court on the date fixed in such proclamation, then, the trial court shall initiate proceedings against him, in accordance with law, under section 174-A I.P.C.

(v) The applicant shall remain present, in person, before the trial court on dates fixed for (1) opening of the case, (2) framing of charge and (3) recording of statement under Section 313 Cr.P.C. If in the opinion of the trial court absence of the applicant is deliberate or without sufficient cause, then it shall be open for the trial court to treat such default as abuse of liberty of bail and proceed against him in accordance with law and the trial court may proceed against him under Section 229-A IPC.

(vi) The applicant shall deposit his passport before the trial court forthwith and shall also not leave the country without prior permission of the Court.

(vii) The trial court may make all possible efforts/endeavour and try to conclude the trial expeditiously after the release of the applicant.

10. The identity, status and residential proof of sureties will be verified by court concerned and in case of breach of any of the conditions mentioned above, court concerned will be at liberty to cancel the bail and send the applicant to prison.

11. The bail application is allowed.

**ISSUE REGARDING E-MAILS BEING SENT BY THE COUNSEL(S) FOR THE APPLICANT TO THE INVESTIGATING OFFICER**

12. Before closing the present matter an important issue which was raised by learned counsel for the Enforcement Directorate with regards to the competency of an Advocate representing the parties to interact directly with the investigating agency with regards to the matter pending in the court in which the said agency is duly represented by its counsel needs to be considered and decided.

13. Learned counsel for the Enforcement Directorate submitted that Supplementary Affidavit dated 29.10.2024 filed on behalf of the applicant encloses with it an e-mail dated 23.09.2024 at 18:36 hours by Mr. Ashul Agarwal from e-mail id- "ashulagarwal7@gmail.com" to e-mail id- "addlzoi43-ed@gov.in" with the following contents:-

*"Sir,*

*As you are aware that bail application filed by my client, Padam Singhee is pending before Allahabad High Court and is listed on 21st October 2024. Vide order dated 02.09.2024, ED was directed to file reply within 3 weeks, however, no reply has been received till now. You are kindly requested to file reply, if so desires."*

14. It is submitted that another e-mail dated 23.09.2024 at 06:48 PM was sent by Mr. Tanveer Ahmad Mir from e-mail id- "tanveer@tamlaw.in" to e-mail id- "addlzoi43-ed@gov.in" with its copy marked on e-mail id- "tamlaw.yash@gmail.com" of Mr. Yash Datt at that time by Advocate Tanveer Ahmed Mir with the following text:-

*"Sir,*

*I am the counsel on record for the petition Mr. Padam Singhee in Application No. 32236/2024 which was last listed for 02.09.2024 on which the Hon'ble High Court vide order of the even date had directed your office to file a reply to the Bail Application within a period of 3 weeks from 02.09.2024 which expire today.*

*Vide the present communication I intend to apprise you that neither my office nor the office of my counsel on record has received any reply from your office.*

*Therefore, in order to avoid any further delay in the above captioned matter, I request you to file the reply to the aforementioned bail matter as expeditiously as possible so that the bail application can be adjudicated finally on the next date of hearing.*
*Sincerely."*

15. It is submitted that an identical supplementary affidavit dated 16.10.2024 has again been filed on behalf of the applicant with the same contents and annexures and both the affidavits have been sworn by the wife of the applicant. It is submitted that sending such emails by

counsel(s) of accused to the Investigating Officer cannot be permitted as a lawyer cannot interact directly with the Investigating Agency and the said act is objectionable and is beyond the professional work of a lawyer since the said officer gets harassed by the same.

16. Learned counsel for the Enforcement Directorate further placed para-2 of the said supplementary affidavit dated 16.10.2024 before the Court which reads as under:-

*"2. That I state that the below mentioned submissions are critical for proper and effective adjudication of the instant bail application.*

*a) The above captioned case was listed before this Hon'ble Court for first time on 02.09.2024, whereby this Hon'ble Court had granted three weeks time to the Directorate of Enforcement for filing a counter affidavit to the bail application of the Applicant. It is pertinent to state herein that the said time of three weeks to file a counter affidavit was specifically granted on the request of the counsels representing the Directorate of Enforcement (ED) and further this Hon'ble Court had granted a further time of two weeks to the Applicant to file a rejoinder to the counter affidavit filed by the Respondent ED and had posted the matter for 21.10.2024. Copy of the order dated 02.09.2024 passed by this Hon'ble Court in Criminal Misc. Bail Application No. 32326 of 2024 is marked as ANNEXURE-SA "1" to the present supplementary affidavit.*

*b) The Applicant herein has been compelled to prefer the present miscellaneous application as the Respondent ED has not yet filed any counter affidavit despite the lapse of three weeks period granted to it from 02.09.2024 which came to an end on 23.09.2024. It is further stated that the counsels for the Applicant even tendered 2 emlails to the concerned investigating officer thereby requesting him to expedite the filing of the Counter affidavit so that the present bail application could be disposed of expeditiously, however, the same was also of no avail. It is further pertinent to state herein that the Applicant is languishing in judicial custody since more than 7 months now. It is imperative that the Respondent ED tenders its reply in time so that the present bail application can be disposed of on the next date of hearing. Copy of the emails dated 23.09.2024 tendered by the counsels for the Applicant to the Investigating Officer from ED are marked as ANNEXURE-SA- "2" to the present supplementary affidavit.*

17. Learned counsel for the applicant in reply/response to the said objection submitted that it is only a reminder to the said agency to comply with the Court's order dated 02.09.2024 and nothing more.

18. The objection of learned counsel for the Enforcement Directorate is with reasonable substance. The Court had passed an order dated 02.09.2024 in the presence of learned counsel for the said agency. If the said order is not complied with, the remedy as available to the party was to bring it to the notice of the Court and intimate the Court about its non-compliance. Sending e-mails and reminding the authorities of the order(s) of Court and requesting them to comply with it, is not in the realm of the duties of counsel(s) appearing in the matter. Even the "Standards of Professional Conduct and Etiquette to be Observed by Advocates" [Made by the Bar Council of India under Section 49(1) (c) of the Advocates Act,

1961] in Section III - "Duty to Opponent" in para-34 states as under:-

*"34. An Advocate shall not in any way communicate or negotiate upon the subject matter of controversy with any party represented by an Advocate except through that Advocate."*

19. The action of learned counsel(s) for the applicant of sending emails directly to the Investigating Officer was not proper and cannot be appreciated. The investigating agency was duly represented by its Counsel/Standing Counsel right from the first day and were expected to comply with any direction(s) given by the Court. If the rival party needed to demonstrate that the same has not been complied with, the proper forum was to apprise the Court when the matter was next placed. A counsel cannot identify himself with his client. He cannot interact directly with agencies like Investigating Officer, etc. unless and until ordered so by a court particularly with regards to sub judice proceedings. Interacting directly with agencies, Investigating Officers, etc., is not the duty of a counsel appointed by an accused. He is to represent him in Court only. His work is to assist the Court. An order passed by a Court is expected to be followed and complied with by parties and if any party has any grievance against the other, the proper procedure is to apprise the Court about it.

20. Thus this Court does not appreciate the said act/conduct of the counsel(s) for the applicant to send emails directly to the Investigating Officer in a matter which was pending before the Court and considers the objection of learned counsel for the Enforcement Directorate to be valid.

21. Pending application(s), if any, shall stand disposed of.

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**(2024) 11 ILRA 444**
**REVISIONAL JURISDICTION**
**CRIMINAL SIDE**
**DATED: LUCKNOW 13.11.2024**

**BEFORE**

**THE HON'BLE SUBHASH VIDYARTHI, J.**

Criminal Revision No. 318 of 2024

**Manbodh @ Manoj & Ors. ...Revisionists**
**Versus**
**State of U.P. & Anr. ...Opposite Parties**

**Counsel for the Revisionists:**
Ashutosh Shukla, Praveen Tripathi

**Counsel for the Opposite Parties:**
G.A., Vijay Kumar Tiwari

**Probation of Offenders Act, 1958 -** Impugned order-trial Court has convicted and sentenced all the accused persons-the benefit of Probation of Offenders Act, 1958 has been granted to co-accused but the same has been denied to the revisionists without assigning any cogent reason- revisionists are also first offenders- Trial Court's order to the extent that it denies the benefit of Act, 1958 to the revisionists, is unsustainable in law-set aside.

**Revision partly allowed.** (E-9)

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

**(I.A. No.2 of 2024- Delay Condonation Application)**

**(I.A. No.3 of 2024- Recall Application)**

1. This is an application for condonation of delay in filing an application for recall of the order dated 29.03.2024 which has been filed by the

opposite party No. 2 - informant on the ground that the revision has been allowed without issuing notice to her and she was not aware about passing of the order dated 29.03.2024 due to which a delay has occurred in filing the application for recall of the order. Recall of the order dated 29.03.2024 has been prayed on the ground that this order has been passed without giving an opportunity to her to oppose the revision.

2. On 04.06.2024, the learned Counsel for the revisionists had prayed for and was granted three weeks' time for filing objections against the applications but no objections have been filed till date, indicating that the revisionist does not dispute the averments made in the applications and the affidavits filed in support thereof.

3. Section 410(2) Cr.P.C. provides as follows: -

*"(2) No order under this section shall be made to the prejudice of the accused or other person unless he has had an opportunity of being heard either personally or by pleader in his own defence."*

4. Apparently, it was mandatory for this Court to have given an opportunity of hearing to the informant and the order dated 29.03.2024 whereby the revision has been allowed without issuing notice to the opposite party No. 2, is not sustainable in law for this reason. Accordingly, both the applications are allowed. The delay in filing the recall application is condoned and the order dated 29.03.2024 is recalled and the revision is being decided afresh.

5. By means of the instant criminal revision filed under Section 397/401 Cr.P.C, the revisionists have assailed the validity of the judgment and order dated 18.03.2024 passed by the Additional Session Judge/F.T.C-I, District Gonda in Criminal Appeal No. 07/2023 (Manbodh alias Manoj and others Vs. State of U.P. and another) as well as the order dated 08.12.2022 passed by the Civil Judge (J.D.)/F.T.C I Gonda in Case No. 180560 of 2018, in Case Crime No. 45/2018 under Sections 498-A, 323, 504, 506 I.P.C and 3/4 of D.P. Act, P.S Wazirganj, District Gonda, whereby the revisionists were convicted and sentenced to 1 year simple imprisonment and fine of Rs. 5,000/- under Section 498-A, six months simple imprisonment under Section 323 I.P.C, six months of simple imprisonment under Section 504 I.P.C and six months simple imprisonment and fine of Rs. 5,000/- under Section 4 of D.P. Act.

6. The learned counsel for the revisionists confined his submission to the extent that the trial Court has convicted and sentenced all the accused persons for offences under Sections 498-A, 323, 504 I.P.C and Section 4 of Dowry Prohibition Act. However, the benefit of Probation of Offenders Act, 1958 has been granted to co-accused Shiv Pyari but the same has been denied to the revisionists without assigning any cogent reason. The learned counsel for the revisionists has further submitted that the revisionists are also first offenders, they have no criminal history and they have been implicated in the present case because of a matrimonial dispute and proceedings for divorce are already pending.

7. The learned counsel for the opposite party No. 2 has submitted that a Criminal Revision cannot be allowed without summoning the trial Court's record as per

the statutory provision contained in Section 397 Cr.P.C. He has further submitted that the record can only be summoned after admission of the revision and the revision has to be heard finally after receipt of the record.

8. The learned counsel for the opposite party No.2 has further submitted that the conduct of the revisionists did not warrant exercise of discretion by this Court in their favour by granting the benefit of Probation of Offenders Act, 1958 to them as the revisionists had ill-treated the informant and had neither provided due respect to her nor has the informant been provided any financial support, although a suit for divorce between the informant and the revisionist No. 1 is said to be pending.

9. Section 397 Cr.P.C. provides as follows: -

***"397. Calling for records to exercise of powers of revision.—(1) The High Court or any Sessions Judge may call for and examine the record of any proceeding before any inferior Criminal Court situate within its or his local jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed, and as to the regularity of any proceedings of such inferior Court,*** *and may, when calling for such record, direct that the execution of any sentence or order be suspended, and if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record.*

*Explanation.—All Magistrates, whether Executive or Judicial, and whether exercising original or appellate jurisdiction, shall be deemed to be inferior to the Sessions Judge for the purposes of this sub-section and of Section 398.*

*(2) The powers of revision conferred by sub-section (1) shall not be exercised in relation to any interlocutory order passed in any appeal, inquiry, trial or other proceeding.*

*(3) If an application under this section has been made by any person either to the High Court or to the Sessions Judge, no further application by the same person shall be entertained by the other of them."*

(Emphasis added)

10. Section 397 Cr.P.C. empowers the High Court to call for and examine the record of any proceeding before any inferior Criminal Court to arrive at a satisfaction as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed, and as to the regularity of any proceedings of such inferior Court.

11. The plane and simple meaning of the words used in Section 397 Cr.P.C. indicates that the High Court has discretion to call for the record of any proceeding, if it is necessary to arrive at a satisfaction as to the correctness, legality or propriety of any finding, sentence or order.

12. Although the revisionists have challenged the order of conviction, the learned counsel for the revisionists had confined his submission to the extent that the trial Court had declined the benefit of the Probation of Offenders Act, 1958 to revisionists whereas the same benefit was granted to a co-accused Shiv Pyari.

13. Where the correctness, legality or propriety of any finding or sentence is not under challenge and the only challenge is to the differential treatment between co-accused persons in the matter of granting

benefit of the Probation of Offenders Act without assigning any cogent reason, which is apparent from a bare perusal of the impugned order itself, there is no requirement of calling for the trial Court's record.

14. The learned Counsel for the opposite party No. 2 did not dispute the facts that the revisionists are first offenders having no criminal history and that all the accused persons have been held guilty of the same set of offences. He merely submitted that while considering the request for grant of benefit of the Probation of Offenders Act, this Court has to keep in mind the conduct of the revisionists, who had ill-treated the opposite party No.2 in her matrimonial home and they are not providing any monetary support to her.

15. Before dealing with this submission, it would be appropriate to have a look at Section 4(1) of the Probation of Offenders Act, 1958 which provides as follows: -

***"4. Power of court to release certain offenders on probation of good conduct.—****(1) When any person is found guilty of having committed an offence not punishable with death or imprisonment for life and the court by which the person is found guilty is of opinion that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it is expedient to release him on probation of good conduct, then, notwithstanding anything contained in any other law for the time being in force, the court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period, not exceeding three years, as the court may direct, and in the meantime to keep the peace and be of good behaviour:*

*Provided that the court shall not direct such release of an offender unless it is satisfied that the offender or his surety, if any, has a fixed place of abode or regular occupation in the place over which the court exercises jurisdiction or in which the offender is likely to live during the period for which he enters into the bond."*

16. Section 4(1) of the Probation of Offenders Act, 1958 comes into play only when a person has been held guilty of committing an offence. The fact that the revisionists have been found guilty of committing the offences under Sections 498-A, 323, 504 I.P.C. and Section 4 of the Dowry Prohibition Act, has given rise to an occasion for claiming the benefit of Section 4(1) of the Probation of Offenders Act, 1958. This fact cannot be a ground for denying the benefit of Section 4(1) of the Probation of Offenders Act, 1958 to the revisionists.

17. The submission made by the learned counsel for the opposite party No. 2 that the revisionists have not provided any maintenance or monetary support to the informant, is the subject matter of matrimonial proceedings between the revisionist No. 1 and the opposite party No. 2 and it does not make out a ground for denying the benefit of Section 4(1) of the Probation of Offenders Act, 1958 to the revisionists.

18. The trial Court has merely stated that the co-accused Shiv Pyari is granted the benefit of Section 4(1) of the Probation of Offenders Act, 1958 and keeping in view the nature of the offence, the revisionists are not entitled to the same

benefit. When all the accused persons have been found guilty of committing the same offences, granting benefit of Section 4(1) of the Probation of Offenders Act, 1958 to one of them and denying the same benefit to the revisionists "keeping in view the nature of the offence" appears to be unreasonable.

19. As the aforesaid unreasonableness in the impugned order is apparent on the face of the impugned order itself, it does not need examination of the entire record of the trial Court. Therefore, this revision is being decided without calling for the record of the trial Court.

20. In view of the aforesaid facts, this Court is of the considered view that the Trial Court's order dated 08.12.2022 to the extent that it denies the benefit of Probation of Offenders Act, 1958 to the revisionists, is unsustainable in law. The other findings recorded in the impugned order have not been challenged.

21. Accordingly, the revision is ***allowed*** in part. The judgment and order dated 08.12.2022, passed by the learned Civil Judge (J.D.)/F.T.C. - I Gonda in Case No.180560 of 2018 arising out of Case Crime No.45 of 2018 under Sections 498-A, 323, 504, 506 I.P.C. and Section 3/4 of Dowry Prohibition Act, Police Station Wazirganj, District Gonda is modified to the extent it denies the benefit of Section 4(1) of Probation of Offenders Act, 1958 to the revisionists and it is provided that in case the revisionists appear before the trial Court and furnish personal bonds and two sureties for their appearance to receive sentence of one year as and when called upon and in the meantime to keep the peace and be of good behavior, the Court shall release them on probation of good conduct. The revisionists shall pay the amount of fine imposed by the trial Court.

22. In case the revisionists fail to observe the aforesaid condition of furnishing a personal bond and two sureties, the benefit of this order shall not be available to them.

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**(2024) 11 ILRA 448**
**APPELLATE JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 21.11.2024**

**BEFORE**

**THE HON'BLE VIPIN CHANDRA DIXIT, J.**

First Appeal From Order No. 1596 of 2022

**Seema Devi ...Appellant**
**Versus**
**Vimal Jain & Anr. ...Respondents**

**Counsel for the Appellant:**
Shekhar Srivastava

**Counsel for the Respondents:**
Ravindra Prakash Srivastava, Yogesh Kumar Mishra

**Civil law-- first appeal from order has been filed on behalf of claimant-appellant- Section 30(1)(a) of Employees Compensation Act, 1923- Sections 2(dd) & 3 — Definition of 'employee' — Casual labour — Death during course of employment — Worker engaged in painting work on third floor —person engaged in repair/painting of multi-storey building falls under Schedule II — Rejection of claim on ground of lack of employee-employer relationship erroneous —painting work is included within meaning of 'repair' — Appeal allowed, matter remanded. (Paras 10 to 15)**

**HELD:**

It is admitted fact that the deceased had received grievous injuries on fateful day 31.03.2015 while working as a painter at the

building of respondent no.1. It is also admitted that the deceased fell down from third storey of building while he was engaged in repairing/painting work. The Employees Compensation Commissioner itself has recorded the finding after considering the evidence adduced by the parties that the deceased was engaged for white washing and painting work on fateful day i.e. 31.03.2015 and fell down from third storey and had received grievous injuries and died on account of injuries received by him. The claim petition was dismissed merely on the ground that the engagement of deceased was purely casual in nature and there was no employee-employer relation. (Para 10)

From the evidence adduced by the parties, it is apparent that the deceased was engaged for repairing/painting work at the house of opposite party no.1 on 31.03.2015 and fell down from third floor and had received injuries and died on account of injuries received by him. The deceased is an employee under the ambit of Employees Compensation Act. The Employees Compensation Commissioner has erred in dismissing the claim petition holding that there was no employeeemployer relation and claim petition was not maintainable, whereas from the definition clause of employee it is apparent that the deceased was working as an employee and had received injuries during the course of his employment. The fining recorded by the Employees compensation Commissioner, in rejecting the claim petition is perverse and against the law. (Para 15)

**Appeal allowed.** (E-14)

**List of Cases cited:**

Nadirsha Hormusji Sidhwa Vs Krishnabai Bala & anr. reported in A.I.R. 1936 Bombay 199

(Delivered by Hon'ble Vipin Chandra Dixit, J.)

1. This first appeal from order has been filed on behalf of claimant-appellant under Section 30(1)(a) of Employees Compensation Act, 1923 against the judgement and order dated 18.05.2022 passed by Employees Compensation Commissioner/ Deputy Labour Commissioner, U.P., Ghaziabad Region, Ghaziabad in E.C.A. Case No.- 164 of 2015 (Smt. Seema Devi Vs. Sri Vimal Jain and another) by which claim petition filed by claimant-appellant was dismissed.

2. Heard Sri Shekhar Srivastava, learned counsel for the appellant and Sri Yogesh Kumar Mishra, learned counsel appearing on behalf of respondent no. 2. No one is present on behalf of respondent no.1 in spite of service of notice.

3. Brief facts of the case are that the claimant had filed claim petition under Section 3 of Employees Compensation Act, 1923 claiming compensation of Rs. 7,68,560/- along with 12% interest on account of death of her husband namely late Sri Mahendra S/O Dhruva @ Dhroop Singh, who died on 31.03.2015 while working at site no.- C-130, Surya Nagar, Ghaziabad. It was the case of claimant before the Employees Compensation Commissioner that the deceased was an employee of opposite party no.2 for the last ten years on the monthly wages of Rs. 9,100/- per month. The opposite party no.2/employer was a contractor, got the contract for wall repairing and painting work from opposite party no.1. The deceased was working on 31.03.2015 at site no.- C-130, Surya Nagar, Ghaziabad belonging to opposite party no.1 on the direction of opposite party no.2. During the course of employment on 31.03.2015 the deceased fell down from third floor of the building and have received grievous injuries and died on 20.04.2015 on account of injuries received by him. The death was occurred arising out and in the course of his employment.

4. The opposite party nos. 1 and 2 put their appearance before the authority below and filed separate written statements denying the claim allegations. It was the

case of defendant-opposite party no.1 that the deceased was never engaged by him and there was no relation of employee-employer between deceased and opposite party no.1. The claim petition against opposite party no.1 is not maintainable and is liable to be dismissed.

5. The opposite party no.2 had also contested the claim petition by filing his written statement denying the claim allegations. The employment of the deceased was denied, but it was admitted that the deceased was engaged for painting work on casual basis at the site of opposite party no.1. It is also admitted that he was also engaged for painting work by opposite party no.1 and while performing painting work the deceased fell down and received grievous injuries and died on account of those injuries.

6. The claimant had appeared before the authority concerned as claimant-witness and had also produced documentary evidence in support of her case. The defendant no.2 was appeared as defendant-witness. The Employees Compensation Commissioner without framing issued of determination had decided the claim petition holding that the deceased was engaged for repairing and white washing on casual basis and there was no relation of master and servant and the claimant is not entitled for any compensation under the Employees Compensation Act.

7. It is submitted by learned counsel for the appellant that the claimant had fully proved her case by producing documentary as well as oral evidence regarding employment of the deceased as painter and death during the course of his employment. The defendant no.2 who was contractor had also admitted that the deceased was engaged for painting work and had received injuries in the incident on 31.03.2015 and died on account of injuries received by him on 20.04.2015. It is further submitted that the Employees Compensation Commissioner, after considering evidence adduced by the parties has accepted the employment of the deceased as casual worker on daily wages, but had rejected the claim petition as it is not maintainable under the Employees Compensation Act. The Employees Compensation Commissioner had also erred in rejecting the claim petition holding that the claimant had failed to prove the employment of the deceased and the deceased was not a permanent employee but was engaged for repairing and painting work on casual basis.

8. On the other hand, learned counsel appearing on behalf of respondent no.2 submits that the Employees Compensation Commissioner has recorded the finding that there was no relation of employee-employer and the claimant had failed to prove the employment of the deceased. The Employees Compensation Commissioner has rightly dismissed the claim petition and there is no illegality in any manner. No ground for interference is made out. The appeal is devoid of merits and is liable to be dismissed.

9. Considered the rival submissions of learned counsel for the parties and perused the record.

10. It is admitted fact that the deceased had received grievous injuries on fateful day 31.03.2015 while working as a painter at the building of respondent no.1. It is also admitted that the deceased fell down from third storey of building while he

was engaged in repairing/painting work. The Employees Compensation Commissioner itself has recorded the finding after considering the evidence adduced by the parties that the deceased was engaged for white washing and painting work on fateful day i.e. 31.03.2015 and fell down from third storey and had received grievous injuries and died on account of injuries received by him. The claim petition was dismissed merely on the ground that the engagement of deceased was purely casual in nature and there was no employee-employer relation.

11. The Employee is defined under Section 2(dd) of Employees Compensation Act, 1923 which is quoted hereinbelow:-

> *2(dd) "employee" means a person, who is-:*
>
> *"(i).*
>
> *(ii).*
>
> *(iii). employed in any such capacity as is specified in Schedule II, whether the contract of employment was made before or after the passing of this Act and whether such contract is expressed or implied, oral or in writing; but does not include any person working in the capacity of a member of the Armed Forces of the Union; and any reference to any employee who has been injured shall, where the employee is dead, include a reference to his dependants or any of them;"*

12. From the perusal of definition of employee, it is apparent that any person in any capacity, which is specified in Schedule II is an employee under the Employees Compensation Act.

13. The relevant portion of para (viii) of Second Schedule is quoted hereinbelow:-

> *"(viii) employed in the construction, maintenance, repair or demolition of –*
>
> *(a) any building which is designed to be or is or has been more than one storey in height above the ground or twelve feet or more from the ground level to the apex of the roof; or*
>
> *(b) any dam or embankment which is twelve feet or more in height from its lowest to its highest point; or*
>
> *(c) any road, bridge, tunnel or canal; or*
>
> *(d) any wharf, quay, sea-wall or other marine work including any moorings of ships; or"*

14. From the bare perusal of definition of employee it is very much clear that any person engaged in construction, maintenance, repairing or demolition of any building, which is more than one story in height above the ground is treated as employee. In the present case, it is admitted fact that the deceased was engaged for repairing/painting work and was fell down from third story. The Hon'ble Bombay High Court in the case of ***Nadirsha Hormusji Sidhwa Vs. Krishnabai Bala and another*** reported in ***A.I.R. 1936 Bombay 199*** has held that the painting work of house include repairing of house. The relevant paragraph is quoted hereinbelow:-

> *"In regard to the third question, whether the painting of the house, which was the work on which the deceased was engaged,*

*was " repair " within the meaning of Clause (viii) of the second schedule, the learned Commissioner held that it was, and I think there was clearly evidence to support that finding. In so far as the question involves the construction of the Act and the schedule, it is one of law, and I entirely agree with the view of the learned Commissioner. I should say that in normal cases the paint of a house becomes part of the structure, and if it falls into disrepair and has to be renewed, I should say that the renewal forms part of the repair of the house, or building, and that view has now been adopted in England : see Dredge v. Conway, Jones & Co. [1901] 2 K. B. 42 Mr. Bahadurji for the appellant has argued that " repair " does not include painting, and in support of that argument he relies on Clause (vii) of the second schedule which is dealing with ships, and includes loading, unloading, fuelling, constructing, repairing, demolishing, cleaning, or painting any ship. It is argued that, inasmuch as the two words " repairing " and " painting" are included in that clause the legislature must have considered that repairing would not include painting and that, therefore, the word " repairs " in Sub-section (viii) should also be held not to include painting. I see no reason for drawing that conclusion. The legislature may have considered that it was less clear in the case of a ship, than in the case of a building, that repairs would include painting. For the reasons I have given it seems to me to be clear that repair must include renewal of the paint of a building. We are not dealing with a case, which might possibly arise and in which at any rate the point would be more arguable, where a house is being repainted simply because the owner wishes to change its colour, and not because the old paint is in a bad state of repair. In the present case the building was being repainted because repainting was necessary. In my opinion that clearly falls within the word "repairs" in Sub-section (viii) of the second schedule, I think, therefore, that the appeal must be dismissed with costs."*

15. From the evidence adduced by the parties, it is apparent that the deceased was engaged for repairing/painting work at the house of opposite party no.1 on 31.03.2015 and fell down from third floor and had received injuries and died on account of injuries received by him. The deceased is an employee under the ambit of Employees Compensation Act. The Employees Compensation Commissioner has erred in dismissing the claim petition holding that there was no employee-employer relation and claim petition was not maintainable, whereas from the definition clause of employee it is apparent that the deceased was working as an employee and had received injuries during the course of his employment. The fining recorded by the Employees compensation Commissioner, in rejecting the claim petition is perverse and against the law.

16. The first appeal from order is ***allowed***. The judgement and order dated 18.05.2022 passed by Employees

Compensation Commissioner/ Deputy Labour Commissioner, U.P., Ghaziabad Region, Ghaziabad in E.C.A. Case No.-164 of 2015 (Smt. Seema Devi Vs. Sri Vimal Jain and another), is set aside.

17. The matter is remanded back to the concerned Employees Compensation Commissioner to decide the claim petition as fresh after affording opportunity of hearing to the parties within a period of six months from the date of production of certified copy of this order, unless there is any legal impediments.

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**(2024) 11 ILRA 453**
**REVISIONAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 14.11.2024**

**BEFORE**

**THE HON'BLE AJIT KUMAR, J.**

S.C.C. Revision No. 146 of 2023

**Er. Prabhu Dayal Agrawal & Ors. ...Revisionists**

**Versus**

**Joint Registrar Co-Operative Society & Anr. ...Opp. Parties**

**Counsel for the Revisionists:**
Arvind Srivastava

**Counsel for the Respondents:**
Tej Bhanu Pandey

**Civil Law -Transfer of Property Act, 1882-Section 106-** in the absence of any contract between the parties or any local law usage to the contrary- the tenancy is terminable upon notice by the landlord in 15 days' advance-notice would not be rendered invalid merely because the period mentioned therein was short -notice is a must to determine the tenancy and once the tenancy has been determined, tenant is liable to be evicted at the instance of the landlord by instituting the suit-impugned order set aside.

**Revision allowed.** (E-9)

**List of Cases cited:**

1. Smt. Anju Srivastava Vs Saurabh Birla & anr.:2020(140) ALR 576

2. Waqf Allal Aulad/Waqf Alkhair Allahtala, Dr. Ziaul Haq Vs Ist ADJ, Bijnor:2008 SCC OnLine All 862

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

1. Heard Sri Arvind Srivastava, learned counsel for the petitioner and Sri Rahul Malviya, learned Standing Counsel for the State-respondent.

2. This revision application has been directed against the judgment and decree dated 16.12.2022 dismissing the suit of the plaintiff.

3. As many as five issues were framed. While the issue no.1 is qua damage caused to the property by the tenant, issue no.2 is qua non-application of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (Act No.13 of 1972). The most crucial issue is the third issue as to whether the plaintiff has been able to determine the tenancy by issuance of notice. The entitlement of the plaintiff for damages @ Rs.600/- per day as issue no.4 and default in payment of rent by the defendant-respondent being issue no.5 have all been decided against the plaintiff.

4. The submission advanced by learned counsel for the revision-applicant is, when the trial court had determined issue no.2 against the defendant-respondent holding that Act No.13 of 1972 did not apply, the Court was neither to see the default in payment of arrears of rent, nor could have seen into the niceties with

which the notice as was claimed to have been issued and served. He submits that as per Section 106 of the Transfer of Property Act, the lease of any immovable property except for agricultural or manufacturing purposes, in the absence of any contract or local law, usage to the contrary, shall be deemed to be on month to month basis and is liable to be terminated with 30 days' of notice in advance.

5. None of the other sub-sections 2, 3 and 4 according to learned Advocate, provides for any format of notice making it compulsory for the landlord to describe the period of default and the amount due to be paid by the tenant. Thus according to him trial court manifestly erred in holding that the notice terminating the tenancy of the defendant-respondent was not valid and non suited the plaintiff. Regarding issue nos.4 and 5 learned counsel argues that Act No.13 of 1972 was not applicable and was rightly so held, the trial court could not have gone into the question of default in payment of arrears of rent. In support of his submission, learned counsel has placed reliance upon paragraph no.19 of the judgment of coordinate Bench of this Court in the matter of ***Smt. Anju Srivastava v. Saurabh Birla and another:2020(140) ALR 576.***

6. Countering the submission, Sri Malviya, learned Standing Counsel for the State-respondents has sought to defend the judgment and order for the reasons assigned in determining the issue nos.3, 4 and 5.

7. Having heard learned counsel for the respective parties and having perused the record and the judgment passed by the Judge, Small Cause dated 16.12.2022, I find there to be the only issue no.3 which if is determined in favour of the plaintiff, petitioner would deserve remand order by this Court for the suit to be decided afresh.

8. For better appreciation of the point raised before the Court to question the finding on issue no.3, I find it appropriate to reproduce Section 106 of Transfer of Property Act, 1882 which runs as under:

> *"106. Duration of certain leases in absence of written contract or local usage.?*
>
> *(1)In the absence of a contract or local law or usage to the contrary, a lease of immovable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice; and a lease of immovable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days' notice.*
>
> *(2)Notwithstanding anything contained in any other law for the time being in force, the period mentioned in sub-section (1) shall commence from the date of receipt of notice.*
>
> *(3)A notice under sub-section (1) shall not be deemed to be invalid merely because the period mentioned therein falls short of the period specified under that sub-section, where a suit or proceeding is filed after the expiry of the period mentioned in that sub-section.*

*(4)Every notice under sub-section (1) must be in writing, signed by or on behalf of the person giving it, and either be sent by post to the party who is intended to be bound by it or be tendered or delivered personally to such party, or to one of his family or servants at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property."*

9. From a bare reading of the aforesaid provisions, it is clear that except where the immovable property is leased out for agricultural or manufacturing purposes, in the absence of any contract between the parties or any local law usage to the contrary what is prescribed under Sub-section 1 of Section 106, the tenancy is terminable upon notice by the landlord in 15 days' advance.

10 Still further, Sub-section 3 of Section 106 clarifies that a notice would not be rendered invalid merely because the period mentioned therein was short as prescribed under Sub-section 1, in the event suit proceedings have been initiated after expiry of the period mentioned in Sub-section-1. The intendment of the legislature therefore, appears to be very clear that notice is a must to determine the tenancy and once the tenancy has been determined, tenant is liable to be evicted at the instance of the landlord by instituting the suit. The only caveat could have been Section 20(4) of Act No.13 of 1972 which ofcourse, is not applicable as has already been held by the trial judge while determining issue no.2. It would have been a different case altogether, had the tenant-respondent took up the plea of deposit made in time to seek benefit under Section 114 of the Transfer of Property Act but neither any such pleading had been raised, nor any such issue was framed. Thus the findings qua issue no.3 returned by the trial judge in the judgment and decree impugned here in this petition is clearly unsustainable.

11. In so far as the issue nos.4 and 5 regarding default in payment of rent, I find that a coordinate Bench of this Court has considered a number of judgments dealing with such matters where the question of termination of tenancy arose and the issue was whether the default part in the conduct of the tenant has to be seen or not and it was held that this question could not have been gone into. The court has heavily relied upon paragraph no.6 judgment in the case of ***Waqf Allal Aulad/Waqf Alkhair Allahtala, Dr. Ziaul Haq v. Ist ADJ, Bijnor:2008 SCC OnLine All 862*** which runs as under:

*"6. If Rent Control Act does not apply, then tenant is liable to eviction simply after termination of tenancy. Default or no default is wholly immaterial. Revisional court itself held that building in dispute belonged to Waqf-allal-aulad and was beyond the purview of U.P. Act No.13 of 1972. Thereafter, there was absolutely no sense in holding that the notice of termination of tenancy was invalid on the ground that tenant was not defaulter when notice was given. The view taken by the lower revisional court is quite strange and utterly untenable. Even if Rent Control Act applies and in the notice wrong period of default and wrong rate of rent is mentioned, still notice does not become invalid vide Full Bench authority of Gokaran Singh Vs. Ist*

*Additional District and Sessions Judge, Hardoi and others, 2000 (1) ARC 653."*

12. Looking to the intendment of the legislature under Section 106 of the Transfer of Property Act, I find that once the tenancy has stood terminated by the issuance of notice as the landlord inclined himself to terminate it, the question of default can ofcourse, rightly should not have been gone into. The proposition of law as discussed in the aforesaid judgment appears to be absolutely incorrect and therefore, I do not find any good ground to differ with the same.

13. Learned Standing Counsel representing the respondents could not place any judgment to the contrary, nor could say that the judgment cited before the Court is no more a good law for being reversed or any contrary view by a larger Bench.

14. In view of the above, this petition succeeds and is ***allowed***. The order passed by the Judge, Small Causes dated 16.12.2022 and the decree issued in respect thereof dated 16.12.2022 are hereby set aside.

15. The matter is remitted to the trial court to decide afresh on the basis of the pleadings already raised and the evidence led by the parties.

16. Since the suit is of the year 2019, it not only stands restored but is also directed to be adjudicated within the next four months of production of certified copy of this order.

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**(2024) 11 ILRA 456**
**ORIGINAL JURISDICTION**

**CIVIL SIDE**
**DATED: ALLAHABAD 07.11.2024**

**BEFORE**

**THE HON'BLE SHEKHAR B. SARAF, J.**
**THE HON'BLE VIPIN CHANDRA DIXIT, J.**

Writ -C No. 22925 of 2024

**Gajendra Pratap Soni ...Petitioner**
**Versus**
**U.O.I. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Sri Kartikeya Saran

**Counsel for the Respondents:**
A.S.G.I., Ms. Archana Singh, C.S.C., Sri Komal Mehrotra, Sri Sudarshan Singh

The petitioner has already run the coco outlet for a period of three years – impugned order rejected Petitioner's selection- Petitioner had already received the benefit of operating the coco outlet-cannot have any right to seek the same once again.

**W.P. dismissed.** (E-9)

**List of Cases cited:**

AIR CMDE Navish Bahri (Retd.) Vs U.O.I. & ors. [W.P. (C) 10686/2020 & CM. Nos.33540/2020 and 13155/2021 decided on November 23, 2021]

(Delivered by Hon'ble Shekhar B. Saraf, J. & Hon'ble Vipin Chandra Dixit, J.)

1. Heard Sri Kartikeya Saran, learned counsel appearing on behalf of the petitioner, Sri Sudarshan Singh, Smt. Archana Singh and Sri Girish Chandra Tiwari, learned counsel appearing on behalf of the respective respondents.

2. This is a writ petition under Article 226 of the Constitution of India wherein the writ petitioners is aggrieved by

the impugned order/email dated June 24, 2024 passed by the respondent No.4/Directorate General Resettlement (DGR), West Block-IV, Rama Krishna Puram, New Delhi.

3. Sri Sudarshan Singh, counsel appearing on behalf of the respondent has relied upon a judgment of Delhi High Court rendered in **AIR CMDE Navish Bahri (Retd.) v. Union of India and others** [W.P. (C) 10686/2020 & CM. Nos.33540/2020 and 13155/2021 decided on November 23, 2021] wherein a similar issue, as in the present writ petition, has specifically been dealt with. The relevant paragraphs are delineated below:

> *44. In this regard, I may state that the Brochure of the Oil Companies is meant for selection of service provider through open selection and also through nomination from DGR / RSB / ZSB (Clause 1.1 and 1.2) but the nomination from DGR / RSB / ZSB is as per SOP issued by DGR. The Brochure of oil companies cannot determine the eligibility for nomination by DGR / RSB / ZSB. In these petitions, this Court is concerned with the nomination from DGR / RSB / ZSB. Paragraph 3.1 is a non-eligibility Clause. Clause 3.1 shall not be applicable to sponsorship by DGR / RSB, inasmuch as the eligibility for sponsorship by the DGR / RSB and ZSB is as per SOP.*
>
> *45. It necessarily follows that a person having already availed COCO RO for the first time, is not eligible for the re-nomination / re-sponsorship for the second time in terms of Clause 4(d). The plea of Mr. Pandey was also by relying upon Clause 10(b) of the SOP which states that extension of the contract would be solely at the discretion of the Oil Company. The said Clause has to be read in the context of the provision, which relates to the award of contract of temporary COCO RO for one year, extendable for another year i.e., two years maximum put together. It is in the context of the said extension that the Clause stipulates that the extension of the contract would be solely at the discretion of the Oil Companies.*
>
> *46. Even on facts, I find, it was the understanding of the petitioner in W.P.(C) 10686/2020 that the benefit of COCO RO availed once would not entitle the service provider re-nomination / re-sponsorship for the second time. This, I say so, because the petitioner had in his undertaking given, while submitting his application has clearly stated the following:-*
>
> ***"UNDERTAKING FORMAT FOR THE OFFICER WHO ARE APPLYING FOR EMPLOYMENT ASSISTANCE***
>
> *1. I, IC/SS No.:16605 H Rank Air Cmde Name Navish Bahri hereby give an undertaking that I have been registered for General Employment COCO Scheme in DGR (DGR Registration No.DGR(O)/14121). However, till date I have not got any resettlement benefit from the applied/registered DGR Schemes.*
>
> *2. In case of my selection in this offer for the post of COCO*

*Retail Outlet at Ms/HSD HP Centre, Moti Nagar, in 1642020 HI CL, COCO Retail Outlet at (Organisation Name), I shall cease to be a "Bonafide Claimer" for any other DESW/DGR Schemes and do undertake that it shall be my in-escapable duty inform DGR of my selection & appointment.*

*3. If in case of any violation of my undertaking, action be taken against me by way of deregistering / debarring me from all DESW/DGR schemes and jobs by the Principal Employer (s)."*

*(emphasis supplied)*

*47. The above depicts that the petitioner has represented that he has not got any re-settlement benefit from the applied / registered DGR scheme. It is an accepted position that the petitioner had registered himself for providing services at COCO RO and had got the benefit for the period 2018-21.*

*48. The plea of Mr. Pandey that the undertaking consisting of the words "I have not got any re-settlement benefit from the applied / registered DGR Scheme" are pre-typed words which could not be edited and there was no alternative for the applicant to give such an undertaking, is clearly an afterthought and in fact it justifies the case of the respondent No.2 / DGR that such a benefit cannot be given for the second time and it is for that reason that those words have been incorporated in the undertaking in a pre-typed form. That means the applicant cannot say, he has availed the benefit earlier.*

*****

*50. It was the plea of Mr. Pandey that one Group Captain Jayveera Pandian (Retd.) even after availing the benefit of COCO RO has been re-nominated for the second time, hence the cancellation of re-nomination / re-sponsorship of the petitioners as service providers of COCO RO is bad and seek parity is concerned, I am afraid such a plea of Mr. Pandey cannot be accepted in view of my conclusion above with regard to the provisions of the SOP issued by the respondent Nos.1 and 2 governing the nomination / sponsorship of the Officers / JCOs for the management of COCO RO, which clearly reveal that there cannot be any re-nomination for the second time, being contrary to the very nature of the scheme to provide re-settlement and welfare of ESMs. It is settled law, that the concept of equality as envisaged under Article 14 of the Constitution is a positive concept which cannot be enforced in a negative manner, as held by the Supreme Court in* ***State of Bihar and Ors. vs. Kameshwar Prasad Singh and Ors., MANU/SC/0358/2000****, and by this Court in* ***Jitendra Singh Naruka vs. University of Delhi & Ors., W.P. (C) 6025/2014.***

4. Upon a perusal of the above judgement, it is clear that the recommendation of the Directorate General Resettlement (hereinafter referred to as "the DGR") is to assist the persons, who have not got the benefit on an earlier occasion. In the present case, the petitioner has already run the coco outlet for a period of three years (2021 to 2024). In light of the

same, the letter issued by the DGR dated June 24, 2024 is relevant as it specifically states that the petitioner should not be considered in the selection process again and his nomination that might have been sponsored through DGR should be treated as invalid and cancelled. This is very much in keeping with the guidelines of the Standard Operating Procedure (hereinafter referred to as "the SOP") for sponsorship of ex-servicemen, officers and JCOs for management of company owned company operated (COCO) retail outlets. Clause 5(c) of the SOP clearly states that the JCOs should not have availed any other benefit from DGR/RSB/ZSB earlier. In the present case, DGR has nominated three persons, and therefore, the petitioner, who had already received the benefit of operating the coco outlet, cannot have any right to seek the same once again.

5. Counsel appearing on behalf of the petitioner has relied upon paragraph 3.1.2 of the Guidelines for Selection of Service Provider for Manpower & Services at Company Owned Company Operated (COCO) Retail Outlets that allows the persons, who are running the coco outlet to once again apply. However, these guidelines are general in nature and would be superseded by the SOP that operates on ex-servicemen. The recommendation of the DGR cannot be given for a second time to the same person, if other candidates are available.

6. The entire rational of the SOP is to provide the benefit to ex-servicemen to meet the financial exigency. Since the petitioner has already availed the benefit on an earlier occasion, he is not entitled to apply once again for the same, specially keeping in mind that there are three other ex-servicemen, who are in fray. In light of the same, the writ petition is dismissed.

7. There shall be no order as to costs.

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**(2024) 11 ILRA 459**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 28.11.2024**

**BEFORE**

**THE HON'BLE SHEKHAR B. SARAF, J.**
**THE HON'BLE VIPIN CHANDRA DIXIT, J.**

Writ -C No. 28196 of 2023

**Manoj Kumar Yadav ...Petitioner**
**Versus**
**State of U.P. & Anr. ...Respondents**

**Counsel for the Petitioner:**
Alok Kumar Yadav, Vashistha Dubey

**Counsel for the Respondents:**
C.S.C.

**Advocate's fees-**Petitioner is a practicing advocate-representation of petitioner claiming his professional fees was rejected for the cases wherein the petitioner represented Gaon Sabha of District Jaunpur.-petitioner was authorized to appear in all the cases where the Gaon Sabhas of district Jaunpur was a party - he appeared before the Court and assisted the Hon'ble Court in all the matters- he is entitled to receive professional fees-the action of respondent no.2 in denying the professional fees to the petitioner is arbitrary and malafide-impugned order set aside.

**W.P. allowed.** (E-9)

(Delivered by Hon'ble Shekhar B. Saraf, J. & Hon'ble Vipin Chandra Dixit, J.)

1. Heard Sri Alok Kumar Yadav, learned counsel for the petitioner, Sri Gireesh Chandra Tiwari, learned Standing Counsel for the State respondents and perused the record.

2. This writ petition has been filed on behalf of petitioner for quashing of impugned order dated 20.7.2023 passed by respondent no.2, by which representation of petitioner claiming his professional fees was rejected as well as for payment of Rs.4,12,275/- along with 18% interest as professional fees for the cases wherein the petitioner represented Gaon Sabha of District Jaunpur.

3. The brief facts of the case are that the petitioner is a practising advocate before this Court since 2004. The petitioner was engaged/appointed as panel advocate to conduct the cases filed against the Gaon Sabha vide order dated 16.5.2013. The petitioner was authorized to receive notices and conduct the cases on behalf of Gaon Sabhas of Varanasi Division. The Varanasi Division includes districts Varanasi, Ghazipur, Jaunpur and Chandauli. The petitioner had worked with utmost sincerity and honesty. Unfortunately, the petitioner was removed from panel of Gaon Sabha on 27.12.2019. The petitioner raised his professional bills for the cases in which he represented the Gaon Sabha. The bills pertains to Gaon Sabhas of District Ghazipur were cleared by the District Magistrate, Ghazipur after due verification and transferred Rs.3,55,350/- in the bank account of petitioner. Similarly the bills pertains to Gaon Sabhas of District Varanasi were also paid to the petitioner. Almost the bills of Gaon Sabhas of District Chandauli were paid and few bills remain unpaid and petitioner has been assured by the competent authority for payment of the same. So far as the District Jaunpur is concerned, in spite of repeated request the outstanding bills were not cleared by the respondent no.2. The petitioner had filed Writ-C No.34606 of 2021 which was disposed of by the Division Bench of this Court on 4.3.2022 directing the authorities concerned to consider the grievance of the petitioner. In spite of order dated 4.3.2022 no heed was paid by respondent no.2, then the petitioner had filed Civil Misc. Contempt Application No.3974 of 2022. After filing contempt petition, the respondent no.2 has passed the order on 15.10.2022 rejecting the claim of the petitioner merely on the ground that bills from Sl. No.1 to 39 are relates to fair price shop, enquiry against Pradhan, Lohia Awas, Gramin Awas, misappropriation of government funds, Anganbadi stipend, ration card and they are not relates to Gaon Sabha. The petitioner again approached to this Court by filing Writ-C No.35750 of 2022 and Division Bench of this Court while dismissing the writ petition vide order dated 21.2.2023 permitted the petitioner to approach the respondent no.2 for his grievances. The petitioner again approached to respondent no.2 by filing detailed representation on 6.3.2023 which was again dismissed by respondent no.2 by the impugned order dated 20.7.2023 relying his earlier order dated 15.10.2022.

4. It is submitted by learned counsel for the petitioner that the petitioner was appointed as panel advocate to conduct the cases on behalf of Gaon Sabha of Varanasi Division. The petitioner appeared in all the cases in which the Gaon Sabha of District Jaunpur was a party and notices were served to the petitioner. The petitioner did his professional work with sincerity and with due diligence and assisted the Hon'ble Court in those matters.

5. It is further submitted that as per engagement/appointment letter, the petitioner was authorized to receive notices in all the cases in which the Gaon Sabha was impleaded as a party and also represent

Gaon Sabha before the Hon'ble Court and as such is entitled for professional fees, as per norms. More so, the payment of professional fees relates to Gaon Sabhas of districts Varanasi, Ghazipur and Chandauli have already been paid by the authorities without raising any objection but his rightful claim has been arbitrarily denied by the respondent no.2. Lastly, it is submitted that from the perusal of impugned orders there is no allegation for non-appearance or not conducting the cases in proper manner have been levelled against the petitioner. The rightful claim was denied merely on the ground that in some of the cases the Gaon Sabha was not a contesting party and that matters were not related to Gaon Sabha directly.

6. On the other hand, learned counsel appearing on behalf of State submits that the claim of the petitioner has been sympathetically considered by the respondent no.2 and after it was found that the matters related to fair price shop, Lohia Awas, Prime Minister Awas, proceedings against Pradhan, family register, Aangabadi stipend and ration card were not related to Gaon Sabha and Gaon Sabha was impleaded as proforma party only and as such the petitioner was not entitled for any payment in the aforesaid matters.

7. Considered the submissions of learned counsel for the parties and perused the record.

8. From the bare perusal of engagement/appointment order dated 16.5.2023, it is apparent that the petitioner was appointed/engaged for Varanasi Division to appear on behalf of Gaon Sabha. The petitioner was authorized to receive notices and to appear on behalf of Gaon Sabha of Varanasi Division for all matters. The Varanasi Division includes districts Varanasi, Ghazipur, Janpur and Chandauli. The relevant extract of engagement letter dated 16.5.2013 is reproduced hereunder:-

"महोदय,

उपर्युक्त विषयक शासनादेश संख्या-2180(2)/1-2-2009-10-3 (34)/93, दिनांक 02 सितम्बर, 2009 को अवक्रमित करते हुए शासनादेश संख्या-1505/1-2-2013-10-3 (34)/93 दिनांक 16 मई 2013 के क्रम में मुझे यह कहने का निदेश हुआ है मा० उच्च न्यायालय इलाहाबाद / लखनऊ बेंच लखनऊ के समक्ष स्तर से योजित होने वाले गांव सभा के सभी मुकदमों (रिट याचिकाओं / अपीलों आदि) में गांव सभा व अन्य की ओर से मा० न्यायालय में उपस्थित होने और पैरवी करने हेतु अधिवक्ताओं के मध्य निम्नानुसार कार्य का बटवारा किया जाता हैः

| क्र०सं० | अधिवक्ता ( गांव सभा) का नाम | आवंटित मण्डल |
|---|---|---|
| 1 | श्री महेश नारायण सिंह | सहारनपुर |
| 2 | श्री अनुज कुमार | चित्रकूट |
| 3 | श्री धर्मदेव चौहान | देवीपाटन |
| 4 | श्री मनोज कुमार यादव | वाराणसी |
| 5 | श्री राम बाबू यादव | विन्ध्याचल |
| 6 | श्री बृज कुमार यादव | कानपुर |
| 7 | श्री दिवाकर सिंह | इलाहाबाद |
| 8 | श्री आनन्द कुमार यादव | झाँसी |
| 9 | श्री रमेश चन्द्र उपाध्याय | आजमगढ़ |
| 10 | श्री अमरेश सिंह | बरेली |
| 11 | श्री योगेन्द्र नाथ यादव | लखनऊ |
| 12 | श्री राजेश यादव | मेरठ |

| | | |
|---|---|---|
| 13 | श्री अरूण कुमार श्रीवास्तव | मु रादाबाद |
| 14 | श्री आशीष कुमार श्रीवास्तव | आ गरा |
| 15 | श्री मनु सिंह, | अ लीगढ़ |
| 16 | श्री जय कुमार | ब स्ती |
| 17 | श्री आजाद खान | फै जाबाद |
| 18 | श्री तारिका मकबूल खान | गो रखपुर |

2- उक्त अधिवक्ताओं द्वारा पैरवी करने पर देय फीस गांव सभा के संचित कोष से वहन की जायेगी।

कृपया उक्त आदेशों से अपने नियंत्रणाधीन समस्त अधिकारियों को अवगत कराने का कष्ट करें।

भवदीय,

(किशन सिंह अटोरिया)

प्रमुख सचिव"

9. From bare perusal of engagement/appointment letter dated 16.5.2023, it is apparent that the petitioner was authorized to appear in all the cases (writ petitions/appeals) in which Gaon Sabha was a party. It is nowhere mentioned that petitioner was not required to appear in the cases which relates to fair price shop, Lohia Awas, Prime Minister Awas, proceedings against Pradhan, family register, Aangabadi stipend and ration card.

10. Since the petitioner was authorized to appear in all the cases where the Gaon Sabhas of district Jaunpur was a party and the copy of the writ petitions/appeals were served upon the petitioner and he appeared before the Court and assisted the Hon'ble Court in all the matters, he is entitled to receive professional fees.

11. Learned Standing Counsel has failed to point out any communication served upon the petitioner that petitioner was not required to appear on behalf of Gaon Sabha in the cases, which relates to fair price shop, Lohia Awas, Prime Minister Awas, proceedings against Pradhan, family register, Aangabadi stipend and ration card. Since the petitioner was authorized to receive notices in all the matters where the Gaon Sabha was a party and he appeared before the Court and assisted the Court, the petitioner is entitled for professional fees. The action of respondent no.2 in denying the professional fees to the petitioner is arbitrary and malafide. It may be noted that the professional fees for the district Varanasi, Ghazipur and Chandauli have already been paid to the petitioner for all the cases in which he appeared on behalf of Gaon Sabha. In light of the same, the impugned order dated 20.7.2023 is liable to be set aside.

12. In view of above, the writ petition is allowed. The impugned order dated 20.7.2023 is set-aside. The respondent no.2 District Magistrate, Jaunpur is directed to re-consider the claim of the petitioner and pay the outstanding professional fees to the petitioner for the cases, where notices for Gaon Sabhas of District Jaunpur were served upon him and he represented the Gaon Sabha before the Court.

13. The writ petition is allowed accordingly.

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**(2024) 11 ILRA 462**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 18.11.2024**

**BEFORE**

**THE HON'BLE SHEKHAR B. SARAF, J.**
**THE HON'BLE VIPIN CHANDRA DIXIT, J.**

Writ -C No. 36846 of 2024

**Sukramapal ...Petitioner**
**Versus**
**Chief Election Commissioner & Ors. ...Respondents**

**Counsel for the Petitioner:**
Ashish Mishra, Dinesh Mishra

**Counsel for the Respondents:**
C.S.C.

**Civil Law - The Representation of the Peoples Act, 1951-Section 80-**Petitioner's seeks quashing of order of rejection of the nomination papers –rejected due to non-filling up of the affidavit accompanying the Form 26,-Clause 6(K) and Clause 8(ii) were not filled up for the bye-election 2024 for the post of M.L.A.-the relief sought is one which can be challenged by way of an election petition under Section 80 of the Act-alternative efficacious remedy .

**W.P. dismissed.** (E-9)

**List of Cases cited:**

Resurgence India Vs Election Commission of India & anr., AIR 2014 Supreme Court 344

(Delivered by Hon'ble Shekhar B. Saraf, J. & Hon'ble Vipin Chandra Dixit, J.)

1. Heard learned counsel appearing for the petitioner and Sri Jitendra Ojha, learned counsel appearing on behalf of the respondent no.1.

2. This is a writ petition under Article 226 of the Constitution of India wherein the writ petitioner seeks quashing of order dated October 28, 2024 passed by the Returning Officer, State Legislative Assembly, for the bye-election 2024 for the post of M.L.A. from 16-Meerapur, Muzaffarnagar.

3. Learned counsel appearing on behalf of the respondent has objected the filing of this writ petition and stated that the same is not maintainable keeping in mind Article 329 of the Constitution of India read with Section 80 and Section 100 of the Representation of the Peoples Act, 1951 (hereinafter referred to as 'The Act'). Learned counsel for the respondent submits that Section 80 categorically bars an election to be called in question except by way of election petition provided in accordance with the provisions of the Act. He further submits that Section 100(1)(C) specifically provides that one of the grounds for declaring election to be void is when a nomination has been improperly rejected. In light of the same he submits that the petitioner has already an alternative efficacious remedy and the challenge made via the route of writ petition is not maintainable. He further submits that since the elections are to be held on November 20, 2024 i.e., two days from date, it is not possible now to include the petitioner in the election process for technical reasons. He further relied on the judgement of the Hon'ble Apex Court in **Resurgence India vs Election Commission of India & Another dated September 13, 2013** reported in **AIR 2014 Supreme Court 344**, wherein the Hon'ble Supreme Court categorically held that non-filling of any portion of the election form and the affidavit that accompanies the same would make the nomination paper liable to be rejected.

4. Learned counsel appearing on behalf of the petitioner has submitted that his fundamental right is being violated without any proper reasons having been offered and he submits that some parts were not filled up since the answers to the questions had been given in the paragraph above.

5. Upon perusal of the documents and the explanation provided by the petitioner and the counter arguments raised by the respondent it is noted that the reason for rejection of the nomination papers were

due to non-filling up of the affidavit accompanying the Form 26, wherein Clause 6(K) and Clause 8(ii) were not filled up. The order passed by the Election Officer is provided below-:

नोमिनेशन पत्र क्रम-34/LA/2024/RO- सुक्रमपाल

आदेश

नामांकन पत्र क्रमांक 34/LA/2024/RO की सम्यक संवीक्षा की गयी। उक्त नामिनेशन पत्र इस कार्यालय में दिनांक 25.10.2024 को अपरान्ह 2:38 बजे प्रस्तुत किया गया। नाम निर्देशन पत्र के साथ संलग्न शपथ पत्र प्रारूप-26 के भाग-क 6 (क), 8 (ii) को मा० उच्चतम न्यायालय के आदेशों व मा० आयोग के निर्देशों के अनुसार पूर्ण एवं सही रूप से नहीं भरा गया जिसके क्रम में संबंधित अभ्यर्थी को चेकलिस्ट (नोटिस) दिनांक 25.10.2024 को प्राप्त कराया गया है एवं पूर्ण व सही भरा हुआ शपथ पत्र ससमय दाखिल करने हेतु सूचित किया। जिसके क्रम में आज दिनांक 28.10.2024 को संवीक्षा प्रारम्भ होने से पूर्व अभ्यर्थी द्वारा नया शपथपत्र दाखिल किया गया। नये शपथपत्र के PART-A के स्तम्भ-8 (ii) (B) (ii) को खाली छोडा गया है। रिटर्निंग अधिकारी के लिए पुस्तिका - 2023 के अध्याय-5 के पैरा-5.16.4 के अनुसार मा० न्यायालय ने कहा है कि यदि किसी मद के लिये प्रस्तुत किये जाने हेतु कोई सूचना नहीं है तो ऐसे स्तम्भ में उपर्युक्त अभियुक्तियां "शून्य" या "लागू नहीं" या "ज्ञात नहीं" को यथा प्रयोज्य दर्शाया जाएगा तथा अध्याय 6 नाम निर्देशन पत्रों की अस्वीकृति के लिये आधार के पैरा-6.10.1 के बिन्दु संख्या 10 के अनुसार शपथ पत्र में कालम खाली छोडे गये और सूचना के बावजूद नया शपथ पत्र दाखिल नहीं किया गया है तो नाम निर्देशन पत्रों की अस्वीकृति के लिये आधार होगा। जो उक्त नाम निर्देशन पत्र को निरस्त करने का पर्याप्त आधार है।

चूंकि पूर्ण भरा हुआ शपथ पत्र प्रारूप-26 नाम निर्देशन पत्र का आधारभूत तत्व है और उक्त अभ्यर्थी द्वारा इस नामांकन पत्र में पूरा नहीं किया गया है। अतः नये शपथ पत्र के सभी कॉलम पूर्ण न होने के कारण तथा कुछ कॉलम रिक्त होने के कारण शपथ पत्र अपूर्ण माना जाता है।

अतः संवीक्षा उपरान्त उक्त नाम निर्देशन पत्र निरस्त किया जाता है।

दिनांक: 28-10-2024

रिटर्निंग आफीसर
विधानसभा-16 मीरापुर

6. Before going into the merits of the present case one may examine the ratio of the Hon'ble Supreme Court judgement in **Resurgence India (supra).** The relevant paragraph is reproduced hereinbelow-:

> *"27) What emerges from the above discussion can be summarized in the form of following directions:*
>
> *(i) The voter has the elementary right to know full particulars of a candidate who is to represent him in the Parliament/Assemblies and such right to get information is universally recognized. Thus, it is*

*held that right to know about the candidate is a natural right flowing from the concept of democracy and is an integral part of Article 19(1)(a) of the Constitution.*

*(ii) The ultimate purpose of filing of affidavit along with the nomination paper is to effectuate the fundamental right of the citizens under Article 19(1)(a) of the Constitution of India. The citizens are supposed to have the necessary information at the time of filing of nomination paper and for that purpose, the Returning Officer can very well compel a candidate to furnish the relevant information.*

*(iii) Filing of affidavit with blank particulars will render the affidavit nugatory.*

*(iv) It is the duty of the Returning Officer to check whether the information required is fully furnished at the time of filing of affidavit with the nomination paper since such information is very vital for giving effect to the 'right to know' of the citizens. If a candidate fails to fill the blanks even after the reminder by the Returning Officer, the nomination paper is fit to be rejected. We do comprehend that the power of Returning Officer to reject the nomination paper must be exercised very sparingly but the bar should not be laid so high that the justice itself is prejudiced.*

*(v) We clarify to the extent that Para 73 of People's Union for Civil Liberties case (supra) will not come in the way of the Returning Officer to reject the nomination paper when affidavit is filed with blank particulars.*

*(vi) The candidate must take the minimum effort to explicitly remark as 'NIL' or 'Not Applicable' or 'Not known' in the columns and not to leave the particulars blank.*

*(vii) Filing of affidavit with blanks will be directly hit by Section 125A(i) of the RP Act However, as the nomination paper itself is rejected by the Returning Officer, we find no reason why the candidate must be again penalized for the same act by prosecuting him/her."*

7. It may be noted that point (iv) and (vi) at paragraph 27 clearly lay down the requirements of the candidates requiring to fill up each column and not leave a single particular blank.

8. In the present case we are of the view that this Court should not go into the issue on merits as the relief sought by the petitioner is one which can be challenged by way of an election petition under Section 80 of the Act. Our comments on the merits are only tentative in the nature and should not influence the Court hearing the election petition, if any.

9. In light of the alternative efficacious remedy available to the petitioner, this writ petition is dismissed with liberty granted to the petitioner to approach the appropriate forum for redressal of his grievance at the appropriate time.

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**(2024) 11 ILRA 466**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 06.11.2024**

**BEFORE**

**THE HON'BLE IRSHAD ALI, J.**

Writ A No. 2003852 of 1991

**Dr. C.B. Agarwal ...Petitioner**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Gaurav Mehrotra, Anurag Srivastava, Rani Singh

**Counsel for the Respondents:**
C.S.C.

**A. Civil Law — Service Law- Constitution of India,1950 – Articles 14, 226, 300-A & 311 – Service Law – Pension – Disciplinary proceedings- Inquiry report – non-supply of report to delinquent before passing punishment order – Violation of principles of natural justice. (Para 18)**

**HELD:**
On careful consideration of the aforesaid judgment, it is evident that even after the amendment in Article 311 of the Constitution of India, the supply of enquiry report is necessary. It is admitted case of the parties that the petitioner has not been supplied with the enquiry report by the Administrative Tribunal while concluding the enquiry. As such, the ratio of the judgment relied upon is fully applicable to the facts and circumstances of the case of the petitioner. (Para 18)

**B. Interim orders – Restoration of writ petition – Revival of interim orders- Interim orders granted prior to dismissal of writ petition are automatically revived upon restoration of the petition unless explicitly vacated- Interim protection granted on 16.07.1991 remained operative upon restoration of the writ petition. (Paras 23 and 26)**
**HELD:**
It is submitted that it is well settled that restoration of a petition automatically revives its ancillary orders/ interlocutory orders passed before its dismissal. In aforesaid regard, reliance has been placed on a judgment rendered in the case of Vareed Jacob Vs Sosamma Geevarghese & ors.[(2004) 6 SCC 378]. (Para 23)

Thus, in the peculiar set of facts wherein in respect of the impugned punishment order, already interim protection was granted and the same continues while the petitioner has already left for his heavenly abode on 17.1.2018, the impugned punishment order dated 20.12.1990 and consequential order dated 12.4.1991 are liable to be aside on the aforesaid ground as well. (Para 26)

**C. Pension – Withholding of pension – Whether pension can be withheld or stopped by administrative orders without due process of law- pension is a constitutional right under Article 300-A- Right to property- Executive orders without statutory backing or breach of due process violate constitutional protections-petition allowed. (Paras 28 and 31)**
**HELD:**
In the instant matter, as has already been enumerated in the discussion of Issue No.1, the procedure prescribed by law, more particularly in constitutional provisions enshrined in Articles 14 and 311, have not been followed inasmuch as the punishment order has been passed without serving a copy of the enquiry report in disciplinary proceedings upon the petitioner, such an action cannot be sustained as the same infringes Right to Property of petitioner as envisaged under Article 300-A of the Constitution of India, which also includes Right to receive pension of petitioner. As for stopping the pension, due procedure established by law was required to be mandatorily followed and the same could not have been done in utter defiance of mandate contained in Article 14 read with Article 311 of Constitution of India. (Para 28)

In a recent judgment dated 23.8.2023, passed in Writ-A No.3180 of 2023 (Prof. Ranjana Sharma & anr.Vs St. of U.P. & others), this Court while allowing the writ petition, has followed the dictum of Hon'ble Supreme Court in St. of Jharkhand (Supra) and Dr. Hiralal (Supra) while reiterating *inter alia* that right to receive pension is included in Right to property under Article 300-A of the Constitution of India. (Para 31)

**Petition allowed.** (E-14)

**List of Cases cited:**

1. U.O.I. & ors.Vs Mohd. Ramzan Khan [(1991) 1 Supreme Court Cases 588]

2. Vareed Jacob Vs Sosamma Geevarghese & ors.[(2004) 6 SCC 378].

3. Jitendra Singh @ Guddan Vs St. of U.P. & others; judgment and order dated 24.8.2009, passed in Writ-C No.545 of 2009

4. St. of Jharkhand & ors.Vs Jitendra Kumar Srivastava [2013 (12) SCC 210]

5. Dr. Hiralal Vs St. of Bihar & others, 2020 (4) SCC 46

6. Prof. Ranjana Sharma & anr.Vs St. of U.P. & others, judgment dated 23.8.2023, passed in Writ-A No.3180 of 2023

(Delivered by Hon'ble Irshad Ali, J.)

1. Heard Sri Gaurav Mehrotra alongwith Mrs. Rani Singh and Mrs. Alina, learned counsel for the petitioner and Sri Rajiv Kumar Singh, learned Standing Counsel for the State-respondent.

2. By means of the present writ petition, the petitioner has challenged the orders dated 20.12.1990, 12.4.1991 and 7.5.1991 (Annexures-11, 12 and 10 respectively). It has been prayed to issue writ of mandamus restraining the respondents from giving effect to the impugned orders referred above and not to stop the pension of the petitioner and not to make any recoveries from the petitioner by adopting coercive means or otherwise in pursuance of the impugned orders.

3. At the time of filing of the writ petition, vide order dated 16.7.1991, following interim order was granted :-

*"Put up this petition after two weeks to enable the Standing Counsel to obtain instructions. In the meantime, the opposite parties shall pay and continue to pay pension to the petitioner as hereto fore the recovery proceedings shall remain stayed."*

4. At the very outset, it is essential to advert to the brief factual background to provide context to the manner in which the present proceedings have arisen.

5. The petitioner was appointed in the Provincial Medical Services, Cadre-I on 22.9.1959. In the year 1974, he was promoted to the post of Consultant (equivalent to the Chief Medical Officer). He was posted at Sitapur between the period 29.6.1978 to 5.2.1980. Thereafter, he was transferred to Kanpur vide order dated 6.2.1980 to join as Joint Director, Employees State Insurance Scheme, Kanpur and he remained there up to 27.2.1980.

6. The petitioner received a demotion order dated 26.2.1980, alleging the charge of illegal purchases of medicine during his tenure at Sitapur. He challenged the said order by filing Writ Petition No.521 of 1980 (C.B. Agarwal Vs. State of U.P.) before this Court, which was allowed vide judgment and order dated 2.9.1982 and the demotion order was quashed.

7. Thereafter, the petitioner was subjected to preventive detention under the National Security Act, which was

challenged vide Writ Petition No.3480 of 1981 before this Court and the detention order was quashed by this Court vide judgment and order dated 4.9.1981. He was served with charge sheet in disciplinary proceeding by the Administrative Tribunal levelling seven charges on him on 28.4.1982. He was then served with second charge sheet in disciplinary proceeding levelling eight charges on 31.5.1982.

8. The disciplinary proceedings were stayed by the Administrative Tribunal till the decision of the Special Judge, Lucknow as both the criminal proceeding and disciplinary proceeding was based on same set of facts vide order dated 21.5.1983. The petitioner was superannuated from service on 31.1.1985.

9. The petitioner was served notice to show cause as to why stay of disciplinary proceedings be not vacated and stipulating that proceeding would proceed ex-parte in event of non turning up of the petitioner on 29.2.1988. The Administrative Tribunal apprised the petitioner that disciplinary enquiry was fixed for 28.4.1989 vide letter dated 27.3.1989. The petitioner in response to the aforesaid letter, filed his reply dated 25.4.1989. He filed reply to the letter dated 2.6.1989, requesting the Tribunal to consider his objection and submissions made vide letter dated 25.4.1989. He then sent letter to Administrative Tribunal on 23.9.1989, requesting to communicate the decision of the Tribunal on his applications dated 25.4.1989 and 22.6.1989.

10. The respondent No.1 i.e. the State of U.P. issued an order dated 20.12.1990, whereby full pension of the petitioner was stopped as also alleged loss caused to the government was sought to be recovered. Consequential order dated 12.4.1991 was issued by respondent No.2 i.e. Director General, Directorate of Medical, Health Services and Family Welfare. Both the aforesaid orders were served upon the petitioner by means of letter dated 7.5.1991 of C.M.O., Sitapur.

11. Feeling aggrieved by the orders dated 20.12.990, 12.4.1991 and letter dated 7.5.1991, the petitioner preferred the instant writ petition, wherein interim order was granted on 16.7.1991 in favour of the petitioner at admission stage providing that pension shall be continued to be paid and recovery proceeding shall remain stayed.

12. Thereafter, the present writ petition was dismissed as having been rendered infructuous due to efflux of time on the statement of learned Standing Counsel. The erstwhile counsel for the petitioner had been elevated to the Bench, hence, the petitioner was not represented on the aforesaid date. On 17.1.2018, the petitioner left for his heavenly abode. On 10.9.2018, substitution application was filed by legal heirs of the petitioner on account of death of the petitioner alongwith delay condonation application.

13. Recall and restoration application was allowed and the instant writ petition was restored to its original number vide order dated 19.5.2023. It is submitted that with the revival of the present writ petition, the interim order passed on 16.7.1991 also got revived and the same still continues.

14. There are three issues which are likely to be decided by this Court on which basis the impugned orders have been challenged, the issues are as under :-

**Issue No.1-** Whether at all a punishment order passed without providing

copy of the enquiry report in disciplinary proceedings to the delinquent employee can sustain in the eyes of law ?

**Issue No.2-** Whether in the instant matter in the peculiar set of facts, where an interim protection was granted by this Court at admission stage providing that pension to the petitioner shall be continued to be paid and the recovery proceeding shall remain stayed which continues to be in operation ?

**Issue No.3-** Whether pension of the petitioner could have been stopped by respondents by issuing impugned order, without meticulously following the procedure prescribed by law as also by the constitutional provisions more particularly Articles 14 and 311 of Constitution of India ?

15. In regard to the first issue, submission of learned counsel for the petitioner is that it is well settled that in disciplinary proceeding, serving a copy of the enquiry report is a condition precedent for inflicting punishment on the delinquent employee and a punishment order issued without serving an enquiry report is untenable and is liable to be set aside by this Court.

In this regard the petitioner has made specific averment in paragraphs-27 and 32 of the writ petition that the petitioner was not provided with enquiry report. It was directly supplied to the disciplinary authority who has not issued second show cause notice alongwith enquiry report to file representation raising objection to the report.

16. The reply of paragraphs-27 and 32 of the writ petition has been given in paragraphs-28 and 32 of the counter affidavit, wherein there is no specific denial in regard to the supply of the enquiry report nor there is any averment in regard to the supply of enquiry report to the petitioner, therefore, the petitioner has made out a case for the grant of relief in exercise of power under Article 226 of the Constitution of India.

17. In support of the submission advanced, learned counsel for the petitioner placed reliance upon a judgment in the case of **Union of India & others Vs. Mohd. Ramzan Khan [(1991) 1 Supreme Court Cases 588].** Relevant paragraphs-2, 3, 7, 11, 13, 14, 15, 17 and 18 are being quoted below :-

*"2. The short point that falls for determination in this bunch of appeals is as to whether with the alteration of the provisions of Article 311(2) under the Forty-second Amendment of the Constitution doing away with the opportunity of showing cause against the proposed punishment, the delinquent has lost his right to be entitled to a copy of the report of enquiry in the disciplinary proceedings.*

*3. Sub-article (2) of Article 311 in the original Constitution read thus:*

*"311. (2) No such person as aforesaid shall be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him;"*

*The effect of this provision came to be considered by a Constitution Bench of this Court in Khem Chand v. Union of India [1958 SCR 1080 : AIR 1958 SC 300 : (1959) 1 LLJ 167] . The learned Chief Justice traced the history of the growth of the service jurisprudence relating to security of the civil service in the country beginning from the Government of India*

*Act of 1915 followed by Section 240 of the Government of India Act of 1935. This Court on that occasion also noticed the judgments of the Privy Council in the cases of R. Venkata Rao v. Secretary of State for India [64 IA 55 : AIR 1937 PC 31] , High Commissioner for India v. I.M. Lall [75 IA 225 : AIR 1948 PC 121] and the judgment of the Federal Court in Secretary of State for India v. I.M. Lall [1945 FCR 103 : AIR 1945 FC 47] and summed up the meaning of 'reasonable opportunity' thus: (SCR pp. 1096-97)*

*"The reasonable opportunity envisaged by the provision under consideration includes—*

*(a) An opportunity to deny his guilt and establish his innocence, which he can only do if he is told what the charges levelled against him are and the allegations on which such charges are based;*

*(b) an opportunity to defend himself by cross-examining the witnesses produced against him and by examining himself or any other witnesses in support of his defence; and finally*

*(c) an opportunity to make his representation as to why the proposed punishment should not be inflicted on him, which he can only do if the competent authority, after the enquiry is over and after applying his mind to the gravity or otherwise of the charges proved against the government servant tentatively proposed to inflict one of the three punishments and communicates the same to the government servant."*

*7. Then came the Forty-second Amendment of the Constitution under which the sub-article (2) was substantially altered. As amended in 1976 the sub-article now reads:*

*"311. (2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an enquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges.*

*Provided that where it is proposed, after such inquiry, to impose upon him any such penalty, such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed:"*

*In terms, the omission of the words 'and where it is proposed, after such inquiry, to impose on him any other penalty, until he has been given a reasonable opportunity of making representation on the penalty proposed, but only on the basis of the evidence adduced during such inquiry' as also the proviso clearly omit the second part of the inquiry as envisaged in Goel case [(1964) 4 SCR 718 : AIR 1964 SC 364 : (1964) 1 LLJ 38] and the concept of 'reasonable opportunity' is satisfied by the delinquent being informed of the charges and of being heard in respect thereof.*

*11. The question which has now to be answered is whether the Forty-second Amendment has brought about any change in the position in the matter of supply of a copy of the report and the effect of non-supply thereof on the punishment imposed.*

*13. Several pronouncements of this Court dealing with Article 311(2) of the Constitution have laid down the test of natural justice in the matter of meeting the charges. This Court on one occasion has stated that two phases of the inquiry contemplated under Article 311(2) prior to the Forty-second Amendment were judicial. That perhaps was a little stretching the position. Even if it does not become a judicial proceeding, there can be no dispute that it is a quasi-judicial one. There*

*is a charge and a denial followed by an inquiry at which evidence is led and assessment of the material before conclusion is reached. These facets do make the matter quasi-judicial and attract the principles of natural justice. As this Court rightly pointed out in the Gujarat case [(1969) 2 SCC 128 : (1970) 1 SCR 251] , the disciplinary authority is very often influenced by the conclusions of the Inquiry Officer and even by the recommendations relating to the nature of punishment to be inflicted. With the Forty-second Amendment, the delinquent officer is not associated with the disciplinary inquiry beyond the recording of evidence and the submissions made on the basis of the material to assist the Inquiry Officer to come to his conclusions. In case his conclusions are kept away from the delinquent officer and the Inquiry Officer submits his conclusions with or without recommendation as to punishment, the delinquent is precluded from knowing the contents thereof although such material is used against him by the disciplinary authority. The report is an adverse material if the Inquiry Officer records a finding of guilt and proposes a punishment so far as the delinquent is concerned. In a quasi-judicial matter, if the delinquent is being deprived of knowledge of the material against him though the same is made available to the punishing authority in the matter of reaching his conclusion, rules of natural justice would be affected. Prof. Wade has pointed out: [ Administrative Law, 6th edn., p. 10]*

*"The concept of natural justice has existed for many centuries and it has crystallised into two rules: that no man should be judge in his own cause; and that no man should suffer without first being given a fair hearing…. They (the courts) have been developing and extending the principles of natural justice so as to build up a kind of code of fair administrative procedure, to be obeyed by authorities of all kinds. They have done this once again, by assuming that Parliament always intends powers to be exercised fairly."*

*14. This Court in Mazharul Islam Hashmi v. State of U.P. [(1979) 4 SCC 537 : 1980 SCC (L&S) 54] pointed out:*

*"Every person must know what he is to meet and he must have opportunity of meeting that case. The legislature, however, can exclude operation of these principles expressly or implicitly. But in the absence of any such exclusion, the principle of natural justice will have to be proved."*

*15. Deletion of the second opportunity from the scheme of Article 311(2) of the Constitution has nothing to do with providing of a copy of the report to the delinquent in the matter of making his representation. Even though the second stage of the inquiry in Article 311(2) has been abolished by amendment, the delinquent is still entitled to represent against the conclusion of the Inquiry Officer holding that the charges or some of the charges are established and holding the delinquent guilty of such charges. For doing away with the effect of the enquiry report or to meet the recommendations of the Inquiry Officer in the matter of imposition of punishment, furnishing a copy of the report becomes necessary and to have the proceeding completed by using some material behind the back of the delinquent is a position not countenanced by fair procedure. While by law application of natural justice could be totally ruled out or truncated, nothing has been done here which could be taken as keeping natural justice out of the proceedings and the series of pronouncements of this Court making rules of natural justice applicable to such*

*an inquiry are not affected by the Forty-second Amendment. We, therefore, come to the conclusion that supply of a copy of the inquiry report along with recommendation, if any, in the matter of proposed punishment to be inflicted would be within the rules of natural justice and the delinquent would, therefore, be entitled to the supply of a copy thereof. The Forty-second Amendment has not brought about any change in this position.*

*17. There have been several decisions in different High Courts which, following the Forty-second Amendment, have taken the view that it is no longer necessary to furnish a copy of the inquiry report to delinquent officers. Even on some occasions this Court has taken that view. Since we have reached a different conclusion the judgments in the different High Courts taking the contrary view must be taken to be no longer laying down good law. We have not been shown any decision of a coordinate or a larger bench of this Court taking this view. Therefore, the conclusion to the contrary reached by any two-Judge bench in this Court will also no longer be taken to be laying down good law, but this shall have prospective application and no punishment imposed shall be open to challenge on this ground.*

*18. We make it clear that wherever there has been an Inquiry Officer and he has furnished a report to the disciplinary authority at the conclusion of the inquiry holding the delinquent guilty of all or any of the charges with proposal for any particular punishment or not, the delinquent is entitled to a copy of such report and will also be entitled to make a representation against it, if he so desires, and non-furnishing of the report would amount to violation of rules of natural justice and make the final order liable to challenge hereafter."*

18. On careful consideration of the aforesaid judgment, it is evident that even after the amendment in Article 311 of the Constitution of India, the supply of enquiry report is necessary. It is admitted case of the parties that the petitioner has not been supplied with the enquiry report by the Administrative Tribunal while concluding the enquiry. As such, the ratio of the judgment relied upon is fully applicable to the facts and circumstances of the case of the petitioner.

19. In regard to the second issue, as a matter of fact, as has already been enumerated, two punishments were inflicted upon the petitioner by means of the orders dated 20.12.1990, 12.4.1991, however, on account of grant of interim order at the admission stage itself on 16.7.1991 by this Court, the petitioner was continuously paid pension and no recovery has been made from him.

20. The aforesaid interim order was never vacated by this Court, however, on the statement made by the learned Standing Counsel, the instant writ petition was dismissed as having been rendered infructuous by efflux of time vide order dated 5.9.2013. The aforesaid order was passed in absence of counsel for the petitioner as the then counsel had been elevated to the Bench and no name was shown in the order dated 5.9.2013. Subsequently, on having come to know of the aforesaid order dated 5.9.2013, three applications were filed by the petitioner on 24.9.2019 and another substitution application was filed on 10.9.2018.

21. The aforesaid four applications were considered by a Division Bench of this Court and were allowed vide order dated 19.5.2023. Vide order dated

19.5.2023, passed by a Division Bench of this Court, the order dated 5.9.2013, dismissing the writ petition being infructuous, was set aside and the application for recall was allowed as also the instant writ petition was restored to its original number.

22. In the instant matter, since even while dismissing the writ petition vide order dated 5.9.2013 for want of prosecution, this Court had not explicitly vacated the interim order dated 16.7.1991. Further in light of the fact that on 19.5.2023, the aforesaid order has been set aside and the writ petition has been restored to its original number, the interim order dated 16.7.1991 continues to be in operation.

23. It is submitted that it is well settled that restoration of a petition automatically revives its ancillary orders/ interlocutory orders passed before its dismissal. In aforesaid regard, reliance has been placed on a judgment rendered in the case of **Vareed Jacob Vs. Sosamma Geevarghese and others [(2004) 6 SCC 378].** Relevant paragraphs-17, 18, 20 and 21 are being quoted as under :-

*"17. In the case of Shivaraya v. Sharnappa [AIR 1968 Mys 283 : (1967) 1 Mys LJ 414] it has been held that the question whether the restoration of the suit revives ancillary orders passed before the dismissal of the suit depends upon the terms in which the order of dismissal is passed and the terms in which the suit is restored. If the court dismisses the suit for default, without any reference to the ancillary orders passed earlier, then the interim orders shall revive as and when the suit is restored. However, if the court dismisses the suit specifically vacating the ancillary orders, then restoration will not revive such ancillary orders. This was a case under Order 39.*

*18. In the case of Saranatha Ayyangar v. Muthiah Moopanar [AIR 1934 Mad 49 : ILR 57 Mad 308] it has been held that on restoration of the suit dismissed for default all interlocutory matters shall stand restored, unless the order of restoration says to the contrary. That as a matter of general rule on restoration of the suit dismissed for default, all interlocutory orders shall stand revived unless during the interregnum between the dismissal of the suit and restoration, there is any alienation in favour of a third party.*

*20. In the case of Nandipati Rami Reddi v. Nandipati Padma Reddy [AIR 1978 AP 30 : (1977) 2 APLJ 64] it has been held by the Division Bench of the Andhra Pradesh High Court that when the suit is restored, all interlocutory orders and their operation during the period between dismissal of the suit for default and restoration shall stand revived. That once the dismissal is set aside, the plaintiff must be restored to the position in which he was situated, when the court dismissed the suit for default. Therefore, it follows that interlocutory orders which have been passed before the dismissal would stand revived along with the suit when the dismissal is set aside and the suit is restored unless the court expressly or by implication excludes the operation of interlocutory orders passed during the period between dismissal of the suit and the restoration.*

*21. In the case of Nancy John Lyndon v. Prabhati Lal Chowdhury [(1987) 4 SCC 78] it has been held that in view of Order 21 Rule 57 CPC it is clear that with the dismissal of the title execution suit for default, the attachment levied earlier ceased. However, it has been further held*

*that when the dismissal was set aside and the suit was restored, the effect of restoring the suit was to restore the position prevalent till the dismissal of the suit or before dismissal of the title execution suit. We repeat that this judgment was under Order 21 Rule 57 whose scheme is similar to Order 38 Rule 11 and Rule 11-A CPC and therefore, we cannot put all interlocutory orders on the same basis."*

24. In a recent judgment of the Hon'ble Supreme Court in the case of **Jai Balaji Industries Vs. D.K. Mohanty & another,** the Court has reiterated the law laid down in the case of **Vareed Jacob** (Supra).

25. In a judgment and order dated 24.8.2009, passed in Writ-C No.545 of 2009 **(Jitendra Singh @ Guddan Vs. State of U.P. & others),** this Court, keeping in view the principles laid down in the case of **Vareed Jacob** (Supra), held that restoration of a petition automatically restores the interim order if not vacated vide a specific order. Relevant extract of the aforesaid judgment passed by this Court is being quoted as under :-

*"It is submitted by Sri Pradeep Chauhan that despite the fact that the order dated 15.5.2009 dismissing the writ petition in default has been recalled on 16.7.2009, the respondents are not treating the interim order dated 15.1.2009 to have revived.*

*In the circumstances, Sri Chauhan prays that necessary clarification be made by the Court. He has placed reliance on para 17 of the decision of the Supreme Court in Vareed Jacob Vs. Sosamma Geevarghese and others, (2004) 6 SCC 378.*

*Civil Misc. Application No. 201688 of 2009 has also been filed on behalf of the petitioner for restoration of the interim order. We have considered the submissions made by the learned counsel for the petitioner.*

*In Vareed Jacob case (supra) their Lordships of the Supreme Court have laid down (paragraph 17 of the said SCC) that the question whether the restoration of the suit revives ancillary orders passed before the dismissal of the suit depends upon the terms in which the order of dismissal is passed and the terms in which the suit is restored. If the Court dismisses the suit for default, without any reference to the ancillary orders passed earlier, then the interim orders shall revive as and when the suit is restored. However, if the Court dismisses the suit specifically vacating the ancillary orders, then restoration will not revive such ancillary orders.*

*Keeping in view the principles laid down in the above decision, let us consider the present case.*

*In the present case, by the order dated 15.5.2009, the writ petition was dismissed in default. However, no specific order was passed vacating the interim order dated 15.1.2009. Consequently, when by the order dated 16.7.2009, the order dated 15.5.2009 dismissing the writ petition in default was recalled by the Court, not only the writ petition stood restored but the interim order dated 15.1.2009 also stood revived. Therefore, the interim order dated 15.1.2009 is continuing in the writ petition.*

*In view of the above, no further order is required to be passed on the aforesaid Civil Misc. Application No. 201688 of 2009 filed on behalf of the petitioner for the restoration of the interim order. The said application stands disposed of."*

26. Thus, in the peculiar set of facts wherein in respect of the impugned

punishment order, already interim protection was granted and the same continues while the petitioner has already left for his heavenly abode on 17.1.2018, the impugned punishment order dated 20.12.1990 and consequential order dated 12.4.1991 are liable to be aside on the aforesaid ground as well.

27. In regard to the third issue that whether pension of the petitioner could have been stopped by respondents by issuing impugned order, without meticulously following the procedure prescribed by law as also by the constitution provisions more particularly Articles 14 and 311 of the Constitution of India, submission of learned counsel for the petitioner is that it can never be done. It is no more *res-integra* that right to receive pension is included in constitutional right of Right to Property as envisaged under Article 300-A thereof.

28. In the instant matter, as has already been enumerated in the discussion of Issue No.1, the procedure prescribed by law, more particularly in constitutional provisions enshrined in Articles 14 and 311, have not been followed inasmuch as the punishment order has been passed without serving a copy of the enquiry report in disciplinary proceedings upon the petitioner, such an action cannot be sustained as the same infringes Right to Property of petitioner as envisaged under Article 300-A of the Constitution of India, which also includes Right to receive pension of petitioner. As for stopping the pension, due procedure established by law was required to be mandatorily followed and the same could not have been done in utter defiance of mandate contained in Article 14 read with Article 311 of Constitution of India.

29. In the aforesaid issue, law has been laid down in catena of judgments holding that benefit of gratuity and pension is a property of an employee. Reliance has been placed in the case of **State of Jharkhand & others Vs. Jitendra Kumar Srivastava [2013 (12) SCC 210].** Relevant paragraphs-14, 15 and 16 are being quoted below :-

*"14. The right to receive pension was recognised as a right to property by the Constitution Bench judgment of this Court in Deokinandan Prasad v. State of Bihar [(1971) 2 SCC 330 : 1971 Supp SCR 634] , as is apparent from the following discussion: (SCC pp. 342-43, paras 27-33)*

*"27. The last question to be considered, is, whether the right to receive pension by a government servant is property, so as to attract Articles 19(1)(f) and 31(1) of the Constitution. This question falls to be decided in order to consider whether the writ petition is maintainable under Article 32. To this aspect, we have already adverted to earlier and we now proceed to consider the same.*

*28. According to the petitioner the right to receive pension is property and the respondents by an executive order dated 12-6-1968 have wrongfully withheld his pension. That order affects his fundamental rights under Articles 19(1)(f) and 31(1) of the Constitution. The respondents, as we have already indicated, do not dispute the right of the petitioner to get pension, but for the order passed on 5-8-1996. There is only a bald averment in the counter-affidavit that no question of any fundamental right arises for consideration. Mr Jha, learned counsel for the respondents, was not prepared to take up the position that the right to receive pension cannot be considered to be*

*property under any circumstances. According to him, in this case, no order has been passed by the State granting pension. We understood the learned counsel to urge that if the State had passed an order granting pension and later on resiles from that order, the latter order may be considered to affect the petitioner's right regarding property so as to attract Articles 19(1)(f) and 31(1) of the Constitution.*

*29. We are not inclined to accept the contention of the learned counsel for the respondents. By a reference to the material provisions in the Pension Rules, we have already indicated that the grant of pension does not depend upon an order being passed by the authorities to that effect. It may be that for the purposes of qualifying the amount having regard to the period of service and other allied matters, it may be necessary for the authorities to pass an order to that effect, but the right to receive pension flows to an officer not because of the said order but by virtue of the rules. The rules, we have already pointed out, clearly recognise the right of persons like the petitioners to receive pension under the circumstances mentioned therein.*

*30. The question whether the pension granted to a public servant is property attracting Article 31(1) came up for consideration before the Punjab High Court in Bhagwant Singh v. Union of India [AIR 1962 Punj 503] . It was held that such a right constitutes 'property' and any interference will be a breach of Article 31(1) of the Constitution. It was further held that the State cannot by an executive order curtail or abolish altogether the right of the public servant to receive pension. This decision was given by a learned Single Judge. This decision was taken up in letters patent appeal by the Union of India. The Letters Patent Bench in its decision in Union of India v. Bhagwant Singh [ILR (1965) 2 Punj 1] approved the decision of the learned Single Judge. The Letters Patent Bench held that the pension granted to a public servant on his retirement is 'property' within the meaning of Article 31(1) of the Constitution and he could be deprived of the same only by an authority of law and that pension does not cease to be property on the mere denial or cancellation of it. It was further held that the character of pension as 'property' cannot possibly undergo such mutation at the whim of a particular person or authority.*

*31. The matter again came up before a Full Bench of the Punjab and Haryana High Court in K.R. Erry v. State of Punjab [AIR 1967 Punj 279 : ILR (1967) 1 Punj 278] . The High Court had to consider the nature of the right of an officer to get pension. The majority quoted with approval the principles laid down in the two earlier decisions of the same High Court, referred to above, and held that the pension is not to be treated as a bounty payable on the sweet will and pleasure of the Government and that the right to superannuation pension including its amount is a valuable right vesting in a government servant. It was further held by the majority that even though an opportunity had already been afforded to the officer on an earlier occasion for showing cause against the imposition of penalty for lapse or misconduct on his part and he has been found guilty, nevertheless, when a cut is sought to be imposed in the quantum of pension payable to an officer on the basis of misconduct already proved against him, a further opportunity to show cause in that regard must be given to the officer. This view regarding the giving of further opportunity was expressed by the learned Judges on the basis of the relevant*

*Punjab Civil Service Rules. But the learned Chief Justice in his dissenting judgment was not prepared to agree with the majority that under such circumstances a further opportunity should be given to an officer when a reduction in the amount of pension payable is made by the State. It is not necessary for us in the case on hand, to consider the question whether before taking action by way of reducing or denying the pension on the basis of disciplinary action already taken, a further notice to show cause should be given to an officer. That question does not arise for consideration before us. Nor are we concerned with the further question regarding the procedure, if any, to be adopted by the authorities before reducing or withholding the pension for the first time after the retirement of an officer. Hence we express no opinion regarding the views expressed by the majority and the minority Judges in the above Punjab High Court decision on this aspect. But we agree with the view of the majority when it has approved its earlier decision that pension is not a bounty payable on the sweet will and pleasure of the Government and that, on the other hand, the right to pension is a valuable right vesting in a government servant.*

*32. This Court in State of M.P. v. Ranojirao Shinde [AIR 1968 SC 1053 : (1968) 3 SCR 489] had to consider the question whether a 'cash grant' is 'property' within the meaning of that expression in Articles 19(1)(f) and 31(1) of the Constitution. This Court held that it was property, observing 'it is obvious that a right to sum of money is property'.*

*33. Having due regard to the above decisions, we are of the opinion that the right of the petitioner to receive pension is property under Article 31(1) and by a mere executive order the State had no power to withhold the same. Similarly, the said claim is also property under Article 19(1)(f) and it is not saved by clause (5) of Article 19. Therefore, it follows that the order dated 12-6-1968, denying the petitioner right to receive pension affects the fundamental right of the petitioner under Articles 19(1)(f) and 31(1) of the Constitution, and as such the writ petition under Article 32 is maintainable. It may be that under the Pension Act (23 of 1871) there is a bar against a civil court entertaining any suit relating to the matters mentioned therein. That does not stand in the way of writ of mandamus being issued to the State to properly consider the claim of the petitioner for payment of pension according to law."*

*15. In State of W.B. v. Haresh C. Banerjee [(2006) 7 SCC 651 : 2006 SCC (L&S) 1719] this Court recognised that even when, after the repeal of Article 19(1)(f) and Article 31(1) of the Constitution vide Constitution (Forty-fourth Amendment) Act, 1978 w.e.f. 20-6-1979, the right to property no longer remained a fundamental right, it was still a constitutional right, as provided in Article 300-A of the Constitution. Right to receive pension was treated as right to property. Otherwise, challenge in that case was to the vires of Rule 10(1) of the West Bengal Services (Death-cum-Retirement Benefit) Rules, 1971 which conferred the right upon the Governor to withhold or withdraw a pension or any part thereof under certain circumstances and the said challenge was repelled by this Court.*

*16. The fact remains that there is an imprimatur to the legal principle that the right to receive pension is recognised as a right in "property". Article 300-A of the Constitution of India reads as under:*

***"300-A.Persons not to be deprived of property save by authority of***

***law.***—*No person shall be deprived of his property save by authority of law."*

*Once we proceed on that premise, the answer to the question posed by us in the beginning of this judgment becomes too obvious. A person cannot be deprived of this pension without the authority of law, which is the constitutional mandate enshrined in Article 300-A of the Constitution. It follows that attempt of the appellant to take away a part of pension or gratuity or even leave encashment without any statutory provision and under the umbrage of administrative instruction cannot be countenanced."*

30. The Hon'ble Supreme Court of India in a matter reported in **2020 (4) SCC 46 in re: Dr. Hiralal Vs. State of Bihar & others**, while reiterating the law laid down in **State of Jharkhand (Supra)**, has held that pension is property within the meaning of Article 300-A of the Constitution of India. For ready reference relevant paragraph of the said judgment is being reproduced below :-

*"24. The right to receive pension has been held to be a right to property protected under Article 300-A of the Constitution even after the repeal of Article 31 (1) by the Constitution (forty-Fourth Amendment) Act, 1978 w.e.f. 20-6-1979, as held in State of W.B. v. Haresh C. Banerjee [State of W.B. v. Haresh C. Banerjee, (2006) 7 SCC 651 : 2006 SCC (L&S) 1719]."*

31. In a recent judgment dated 23.8.2023, passed in Writ-A No.3180 of 2023 **(Prof. Ranjana Sharma & another Vs. State of U.P. & others),** this Court while allowing the writ petition, has followed the dictum of Hon'ble Supreme Court in **State of Jharkhand** (Supra) and **Dr. Hiralal** (Supra) while reiterating *inter-alia* that right to receive pension is included in Right to property under Article 300-A of the Constitution of India.

32. The impugned punishment order dated 20.12.2019 issued by respondent No.1, whereby the full pension of the petitioner was stopped and the consequential order dated 12.4.1991 issued by respondent No.2 and order dated 20.12.1990 issued by the State Government are in gross violation of right to receive pension which is included in right to property as envisaged in Article 300-A of the Constitution of India as well as in violation of principles of natural justice and the copy of the enquiry report has not been supplied to the petitioner by the Administrative Tribunal nor by the disciplinary authority in the matter.

33. In view of the above, the submission of learned Standing Counsel as well as statement made in the counter affidavit cannot make the impugned order good, therefore, submission advanced by learned Standing Counsel is hereby rejected being no merit.

34. For all the reasons and discussions recorded above, the impugned orders dated 20.12.1990, 12.4.1991 and 7.5.1991 do not sustain and are hereby quashed. The writ petition succeeds and is **allowed.**

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**(2024) 11 ILRA 478**
**APPELLATE JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 11.11.2024**

**BEFORE**

**THE HON'BLE ASHWANI KUMAR MISHRA, J.**
**THE HON'BLE DR. GAUTAM CHOWDHARY, J.**

Criminal Appeal No. 4508 of 2024

**Sher Singh & Ors. ...Appellants**
**Versus**
**State of U.P. ...Respondent**

**Counsel for the Appellants:**
Pradeep Kumar Rai, Sr. Advocate

**Counsel for the Respondent:**
G.A.

**Circumstantial evidence -**Neither any complaint was made in respect of the alleged incident occurred four months back- nor any Police report etc is on record-alleged enmity not been substantiated by the prosecution-prosecution has not confronted the accused persons with the circumstance of the incident-in the absence of such facts/circumstances having been referred to the accused persons- the facts in that regard cannot be relied upon by the prosecution as an evidence not confronted to the accused under Section 313 Cr.P.C.- cannot be read or relied upon in evidence- in the second St.ment the motive has been introduced in the testimony of witnesses- neither motive is convincing - circumstantial evidence not been carefully dissected by the trial court and the contradictions in the version of witnesses have been overlooked- related witnesses-impugned judgment and order set aside.

**Appeal allowed.** (E-9)

**List of Cases cited:**

Nizam Vs St. of Raj., (2016) 1 SCC 550

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

1. This appeal is directed against the judgment and order of conviction and sentence dated 30.03.2024, passed by the Sessions Judge at Firozabad in Sessions Trial No.300669 of 2013 (State of U.P. Vs. Sher Singh and others), arising out of Case Crime No.297 of 2012, Police Station Tundla, District Firozabad, whereby the accused appellants Sher Singh, Arjun Singh and Sanju have been convicted and sentenced to undergo ten years rigorous imprisonment alongwith fine of Rs.10,000/-, each, and in default of payment of fine, they shall undergo six months additional imprisonment and under Section 302 I.P.C. read with Section 34 of I.P.C. to undergo life imprisonment and a fine of Rs.10,000/-, each, and in default of payment of fine, they shall undergo six months additional imprisonment. All the sentences are directed to run concurrently.

2. The father of the deceased, namely, Charan Singh has lodged a written report stating that his 25 year old son Amar Pal @ Rinku (deceased) was running a shop of toys near the Vaishnav Dham Shrine. He used to sleep in the night at his shop. As per his routine, he had gone at about 7.00 p.m. on 29.04.2012 after having his meals to the shop but did not return in the morning. The informant visited the shop and found his son missing. On inquiry from the nearby shop owners, it transpired that two unknown persons had taken his son on a motorcycle, whereafter his mutilated body was found near the Agricultural University, having multiple stab wounds. Apprehension was expressed that due to enmity his son has been done to death. The body has been recovered near Kishan Dhabba, which is close to NH-2 in Village Kushayni. On this report FIR came to be lodged on 30.04.2012, under Section 302 I.P.C. Inquest was held on 30.04.2012 at 12.30 p.m. The inquest witnesses found multiple stab wounds on the body of the deceased and it was resolved that postmortem be conducted to ascertain the cause of death. The postmortem has been conducted in which following injuries were found on body of the deceased:

*"1-A L/W of size 3.0 c.m. x 3.0 c.m. x bone deep over middle of front of fore head clotted blood present.*

*2-A L/W of size 5.0 x 3.0 x bone deep over left cheek just*

*below left eye clotted blood present.*

*3-Multiple abrasion over neck 7.0 c.m. below chin. In an area 14.0 c.m. x 8.0 c.m. over hyoid bone.*

*4-Multiple abrasion over back. In whole chest and abdomen up to hip.“*

3. The FIR, admittedly, was lodged against unknown persons and the role of the accused appellants surfaced on the basis of an application of informant dated 17.05.2012, which is exhibited as Ka-2. In his report, the informant alleged that he has come to know that his son was done to death by the accused persons, namely, Sher Singh and Arjun Singh sons of Bhogi Ram and brother-in-law of accused Arjun Singh, namely, Sanju who lives with Arjun Singh. This application further stated that about four months earlier accused Sher Singh had alleged that informant’s younger son Deepchand had an affair with his daughter. Deepchand was engaged in running cable business. On this apprehension, the aforesaid three accused had assaulted Deepchand and Amarpal and had extended threats that they would not leave them. It is also asserted that ever since the death of the deceased the accused persons are missing and consequently apprehension was expressed that these appellants have committed the murder of the deceased. It is on the basis of the apprehension expressed in the application of 17.05.2012 that the accused appellants have been implicated and a charge-sheet was submitted by the Investigating Officer on 16.08.2012. Cognizance was taken on the charge-sheet and case was committed to the court of Sessions which was registered as Sessions Trial No.300669 of 2013 (State of U.P. Vs. Sher Singh and others). Charges were framed against the accused appellants under Sections 364 I.P.C. as well as under Section 302 I.P.C. read with Section 34 I.P.C. Charges were read out to the accused persons, who denied the accusations and demanded trial.

4. During the course of trial following documentary evidences have been produced:-

*"i. F.I.R., Ex.Ka.11, dt. 30.04.2012.*

*ii. Written Report, Ex.Ka.1, dt. 30.04.2012.*

*iii. Application to S.O., Ex.Ka.2, dt. 17.05.2012.*

*iv. Recovery Memo of pieces of Blood Stained & Plain Soil, Ex.Ka.10, dt. 30.04.2012.*

*v. P.M. Report, Ex.Ka.4, dt. 30.04.2012.*

*vi. ‘Panchayatnama’, Ex.Ka.3, dt. 30.04.2012.*

*vii. Charge-sheet ‘Mool’, Ex.Ka.14, dt. 16.08.2012.*

*viii. Charge framed by S.J., dt. 18.12.2013.*

*ix. Note of S.J., dt. 18.12.2013."*

5. In addition to the above, oral testimony has been adduced of the informant as P.W.-1. P.W.-2 Bhagwan Singh as well as P.W.-4 Mohar Singh are two witnesses of inquest. P.W.-3 and P.W.-5, namely, Kuldeep Singh and Shyamveer Singh are the witnesses of last seen. P.W.-6 is Dr. NM Pathak, who has conducted the autopsy. P.W.-7 to P.W.-10, namely, Nand Kishor Gaud, Shyam Sundar Gautam, Dashrath Singh and Harpal Singh, are all formal Police witnesses.

6. The evidence led against the accused persons by the prosecution has

been confronted to the accused who all have stated that they have been falsely implicated on account of Village Partiband. The trial court on the basis of evidence led in the matter has convicted and sentenced the accused appellants as per above. Aggrieved by the aforesaid judgment of conviction and sentence, the accused appellants are before this Court.

7. Shri Kamal Krishna, learned Senior Counsel assisted by Shri Pradeep Kumar Rai, learned counsel for the appellants submits that this is a case of circumstantial evidence in which chain of circumstances is not complete. It is also submitted that except for the testimony of P.W.-3 and P.W.-5, there is no other evidence to implicate the accused appellants. Learned counsel also argues that the testimony of P.W.-3 and P.W.-5 are not reliable. Learned counsel also averred that the motive for the offence has been introduced for the first time vide application dated 17.05.2012 and was not a part of the statement of the prosecution witnesses in their statement under Section 161 Cr.P.C. or in the first information report.

8. Shri Pankaj Kumar Tripathi, learned A.G.A. for the State, on the other hand, submits that the chain of circumstances has been successfully connected by the prosecution in the present case inasmuch as there exists prior enmity between the parties and the testimony of two witnesses of last seen clearly and categorically connects the accused appellants with the commissioning of the offence.

9. We have heard Shri Kamal Krishna, learned Senior Counsel assisted by Shri Pradeep Kumar Rai, learned counsel for the appellants and Shri Pankaj Kumar Tripathi, learned A.G.A. for the State and have perused the materials on record including the trial court record.

10. Admittedly, this is a case based on circumstantial evidence. The first information report is on record which clearly goes to show that the informant was intimated by the nearby shop owners that two unknown persons have taken the deceased on a motorcycle, thereafter, his dead body was recovered from near a dhabba on the next morning. P.W.-1, admittedly, is not an eye witness. He is also not a witness of last seen. The persons from whom information was received by P.W.-1 about two unknown persons having taken the deceased on a motorcycle has also not been specified in the testimony of P.W.-1.

11. The primary witnesses of prosecution to implicate the accused appellants are Kuldeep Singh (P.W.-3) and Shyam Veer Singh (P.W.-5). These two witnesses in their examination-in-chief have stated that they had gone to offer prayers at the Vaishno Devi Temple at 8.00 p.m. and they saw that accused Sher Singh on one motorcycle, whereas accused Arjun Singh and Sanju on another motorcycle arrived near the shop of the deceased and were talking to them. It is, thereafter, that the deceased Amar Pal was made to sit behind Arjun Singh on his motorcycle and he saw this incident in the light of the temple. P.W.-3 has stated that he had not objected to the going of the deceased with the accused as this was an internal matter of the villagers.

12. P.W.-3 in his testimony stated that at about 12.00 in the afternoon of 30.04.2012, he came to know that the dead body of the deceased has been found and

being a relative he visited the house of Charan Singh (P.W.-1) at about 4.00 p.m. He had not met Shyam Veer Singh on that day. He states that what he saw at about 8.00 p.m. on 29.04.2012 was not disclosed on 30.04.2012 as he himself was scared. He claims that on 16.05.2012 he informed Charan Singh about the incident and later his statement was recorded by the I.O. on 17.05.2012. This witness has further stated that he had not disclosed the I.O. about having told Charan Singh of the incident on 16.05.2012. He has denied the fact that such a fact was told by the informant to the I.O. P.W.-3 had not met Charan Singh between 12.05.2012 to 16.05.2012. He met Charan singh on 16.05.2012 and P.W.-5 was sitting there from before. This witness has denied the suggestion that being a related witness, he has made a false statement to implicate the accused appellants. He has admitted that prior to 16.05.2012, he had not told such facts to the Police. He has also stated that the fact about affair between Deepchand and the daughter of Sher Singh came to his knowledge after the murder of the deceased-Amar Pal. He had not disclosed anything to Charan Singh on 29.04.2012. He has also denied the allegation of affair.

13. P.W.-5 is the other witness of last seen. He has stated that along with P.W.-3 he had gone to the temple on 29.04.2012 at about 8.00 p.m. He too has stated that the three accused came on two motorcycles and took the deceased with them. On the next day, he came to know about the incident. P.W.-5 has categorically stated that he visited the house of P.W.-1 the very next day and explained what he had seen to P.W.-1. He later came to know about the affair between daughter of Sher Singh and Deepchand. In the cross-examination, P.W.-5 has stated that he informed Charan Singh about the incident on 16.05.2012. He has denied his previous statement under Section 161 Cr.P.C. wherein he told Charan Singh about the incident on the date his statement was recorded. He also stated that the affair between Deepchand and daughter of Sher Singh came to his notice only on 16.05.2012 from P.W.-1. This witness has further stated that he has no knowledge that any incident occurred, wherein accused persons had done anything to Deepchand earlier. He has also admitted that P.W.-3 is his friend.

14. Prosecution case since primarily relies upon the statement of P.W.-3 and P.W.-5 as such we are required to consider the evidentiary value of these two witnesses. P.W.-3 and P.W.-5 admittedly are related to P.W.-1 and being an interested witnesses their testimony will have to be analysed with care and caution. In the FIR, nobody has been named by the informant. It is for the first time by an application filed on 17.05.2012 (Ka-2) that apprehension was expressed against the accused persons by the informant. In his application, P.W.-1 has not stated that he gathered information about the incident from P.W.-3 or P.W.-5. This application dated 17.05.2012 although implicates the accused persons but contains no reference to any disclosure made by P.W.-3 or P.W.-5 to P.W.-1.

15. P.W.-1 in his testimony states that only on 16.05.2012, he was informed by P.W.-3 and P.W.-5 that they saw the accused persons taking the deceased on a motorbike at about 8.00 p.m. on 29.04.2012.

16. As against the testimony of P.W.-1, P.W.-3 and P.W.-5 both state that they visited the house of P.W.-1 on

30.04.2012 itself. If P.W.-3 and P.W.-5 visited the house of P.W.-1 on 30.04.2012 itself, there is no reason why these persons withheld the information with regard to implication of the accused persons on account of their having taken the deceased with them on the motorcycle.

17. There is a contradiction in the version of P.W.-3 and P.W.-5 vis-a-vis the statement of P.W.-1 with regard to the manner in which disclosure was made by P.W.-3 and P.W.-5 to P.W.-1. P.W.-1 states that only on 16.05.2012 such disclosure was made by P.W.-3 and P.W.-5 to him, whereas P.W.-3 and P.W.-5 stated that the incident and the facts relating thereto were told to P.W.-1 by them on 30.04.2012 itself. This contradiction has a material bearing on the reliability of the witness, particularly, as in the FIR, none is named. P.W.-3 and P.W.-5 are otherwise related witnesses and their testimony would require careful evaluation. The version of P.W.-3 and P.W.-5 since is contradicted by the statement of P.W.-1, we do not find the testimony of witnesses of last seen to be entirely reliable.

18. Before coming to a conclusion on the evidentiary value of P.W.-3 and P.W.-5, we would like to refer to the evidence on the aspect of motive relied upon by the prosecution.

19. Prosecution case is that about four months prior to the incident, Sher Singh challenged the deceased and his brother Deepchand on account of alleged affair between Deepchand and the daughter of Sher Singh. It is also the prosecution case that accused persons had assaulted Deepchand and Amar Singh and had also extended threats. This fact, however, has neither been referred to in the FIR nor has been referred by any of the prosecution witness in their statement under Section 161 Cr.P.C. It is otherwise a matter of record that neither any complaint was made in respect of the alleged incident occurred four months back nor any Police report etc is on record. The alleged enmity on the basis of such incident has otherwise not been substantiated by the prosecution. We also find it some what illogical for the accused persons to have killed the deceased when the motive was against Deepchand on account of Deepchand having an affair with the daughter of the accused Sher Singh. Merely because the brother of the deceased was having an affair with the daughter of Sher Singh, it would be difficult to believe that the accused persons instead of picking Deepchand would eliminate Amar Pal.

20. In addition to the peculiarities referred to above, we also find that prosecution has not confronted the accused persons with the circumstance of the incident that occurred four months prior to the incident in question. The statement under Section 313 Cr.P.C. has been placed before this Court and we find no reference to the evidence with regard to the incident which occurred four months prior to the murder of the deceased, wherein the deceased and Deepchand were allegedly assaulted. In the absence of such facts/circumstances having been referred to the accused persons, the facts in that regard cannot be relied upon by the prosecution as an evidence not confronted to the accused under Section 313 Cr.P.C. cannot be read or relied upon in evidence. Reliance has placed upon the recent judgment of the Supreme Court in Premchand Vs. The State of Maharashtra (2023) 5 SCC 522. Reliance has also placed upon the recent judgment of the Supreme Court in Maheshwar Tigga Vs. State of Jharkhand

(2020) 10 SCC 108. Relevant para Nos. 7 to 9 of the later judgment are reproduced hereinafter:-

> *"7. A bare perusal of the examination of the accused under Section 313 CrPC reveals it to be extremely casual and perfunctory in nature. Three capsuled questions only were asked to the appellant as follows which he denied:*
>
> *"Question 1. There is a witness against you that when the informant V. Anshumala Tigga was going to school you were hiding near Tomra canal and after finding the informant in isolation you forced her to strip naked on knifepoint and raped her.*
>
> *Question 2. After the rape when the informant ran to her home crying to inform her parents about the incident and when the parents of the informant came to you to inquire about the incident, you told them that "if I have committed rape then I will keep her as my wife".*
>
> *Question 3. On your instruction, the informant's parents performed the "Lota Paani" ceremony of the informant, in which the informant as well as your parents were present, also in the said ceremony your parents had gifted the informant a saree and a blouse and the informant's parents had also gifted you some clothes."*
>
> *8. It stands well settled that circumstances not put to an accused under Section 313 CrPC cannot be used against him, and must be excluded from consideration. In a criminal trial, the importance of the questions put to an accused are basic to the principles of natural justice as it provides him the opportunity not only to furnish his defence, but also to explain the incriminating circumstances against him. A probable defence raised by an accused is sufficient to rebut the accusation without the requirement of proof beyond reasonable doubt.*
>
> *9. This Court, time and again, has emphasised the importance of putting all relevant questions to an accused under Section 313 CrPC. In Naval Kishore Singh v. State of Bihar [Naval Kishore Singh v. State of Bihar, (2004) 7 SCC 502 : 2004 SCC (Cri) 1967] , it was held to be an essential part of a fair trial observing as follows : (SCC p. 504, para 5)*
>
> *"5. The questioning of the accused under Section 313 CrPC was done in the most unsatisfactory manner. Under Section 313 CrPC the accused should have been given opportunity to explain any of the circumstances appearing in the evidence against him. At least, the various items of evidence, which had been produced by the prosecution, should have been put to the accused in the form of questions and he should have been given opportunity to give his explanation. No such opportunity was given to the accused in the instant case. We deprecate the practice of putting the entire evidence against the accused put together in a single question and giving an opportunity to explain the same, as the accused may not be in a position to give a rational and*

*intelligent explanation. The trial Judge should have kept in mind the importance of giving an opportunity to the accused to explain the adverse circumstances in the evidence and the Section 313 examination shall not be carried out as an empty formality. It is only after the entire evidence is unfurled the accused would be in a position to articulate his defence and to give explanation to the circumstances appearing in evidence against him. Such an opportunity being given to the accused is part of a fair trial and if it is done in a slipshod manner, it may result in imperfect appreciation of evidence."*

21. It is only after 17.05.2012 that in the second statement the motive has been introduced in the testimony of witnesses. The motive was clearly missing in the first statement of witnesses recorded under Section 161 Cr.P.C.

22. On evaluation of the above evidence, we find that neither motive is convincing nor the alleged instance occurred four months prior to the incident, giving rise to the motive, can be read or relied upon against the accused persons in the absence of such facts having been confronted to the accused persons under Section 313 Cr.P.C.

23. Coming to the evidence of last seen, we find that the two prosecution witnesses of last seen, namely, P.W.-3 and P.W.-5 have clearly stated that they visited the house of the informant on 30.04.2012 itself. They are otherwise related to P.W.-1. In such circumstances, it was expected that these two persons would disclose P.W.-1 about what they saw on previous day, wherein the accused persons took the deceased on the motorcycle. The fact that P.W.-1 for the first time introduced such case by an application moved on 17.05.2012 creates a doubt as the delay of nearly 16 days in disclosing such facts to the I.O. raises a doubt upon the credibility of P.W.-3 and P.W.-5. In a recent judgment of the Supreme Court in Shahid Khan Vs. State of Rajasthan (2016) 4 SCC 96 the Hon'ble Supreme Court viewed with suspicion the non furnishing of explanation in respect of three days delay in recording of statement under Section 161 Cr.P.C. para 20 of the judgment, in this regard, is reproduced hereinafter:-

*"20. The statements of PW 25 Mirza Majid Beg and PW 24 Mohamed Shakir were recorded after 3 days of the occurrence. No explanation is forthcoming as to why they were not examined for 3 days. It is also not known as to how the police came to know that these witnesses saw the occurrence. The delay in recording the statements casts a serious doubt about their being eyewitnesses to the occurrence. It may suggest that the investigating officer was deliberately marking time with a view to decide about the shape to be given to the case and the eyewitnesses to be introduced. The circumstances in this case lend such significance to this delay. PW 25 Mirza Majid Beg and PW 24 Mohamed Shakir, in view of their unexplained silence and delayed statement to the police, do not appear to us to be wholly reliable witnesses. There is no corroboration of their evidence from any other independent source*

*either. We find it rather unsafe to rely upon their evidence only to uphold the conviction and sentence of the appellants. The High Court has failed to advert to the contentions raised by the appellants and reappreciate the evidence thereby resulting in miscarriage of justice. In our opinion, the case against the appellants has not been proved beyond reasonable doubt."*

24. As against the delay of three days in the above matter, we find that the delay occasioned in the present case is of 16 days for which no plausible explanation has been put-forth. In view of the fact that the accused persons otherwise are related witnesses, the delay in that regard would raise a further doubt on the prosecution case. Since the motive has otherwise not been found convincing, we find that chain of circumstances is not connected by the prosecution, which may establish the hypothesis of guilt specifically attributed to the accused appellants. Even otherwise merely on the strength of evidence of last seen, the chain of circumstance would not be complete. We find support in taking such a view from the observations made by the judgment of Supreme Court in Nizam v. State of Rajasthan, (2016) 1 SCC 550. The relevant para 14 of the judgment is reproduced hereinafter:-

*"14. The courts below convicted the appellants on the evidence of PWs 1 and 2 that the deceased was last seen alive with the appellants on 23-1-2001. Undoubtedly, the "last seen theory" is an important link in the chain of circumstances that would point towards the guilt of the accused with some certainty. The "last seen theory" holds the courts to shift the burden of proof to the accused and the accused to offer a reasonable explanation as to the cause of death of the deceased. It is well settled by this Court that it is not prudent to base the conviction solely on "last seen theory". "Last seen theory" should be applied taking into consideration the case of the prosecution in its entirety and keeping in mind the circumstances that precede and follow the point of being so last seen."*

25. We have been taken through the judgment of conviction and sentence passed by the court below by the learned A.G.A. in order to submit that the appeal lacks merit. However, having perused the judgment, we find that circumstantial evidence relied upon by the prosecution has not been carefully dissected by the trial court and the contradictions in the version of P.W.-1 vis-a-vis P.W.-3 and P.W.-5 have been overlooked. The fact that P.W.-3 and P.W.-5 were related witnesses and their testimony required careful examination has also escape the attention of the trial court. Since we do not find the testimony of P.W.-3 and P.W.-5 to be entirely reliable, in view of the contradictory statement made therein, as such, in the absence of any cogent corroboration of the prosecution case in order to implicate the accused persons, we disapprove the conclusions and findings returned by the trial court with regard to conviction and sentence of the accused appellants, consequently, this appeal succeeds and is allowed. The judgment and order dated 30.03.2024, passed by the Sessions Judge at Firozabad in Sessions Trial No.300669 of 2013 (State

of U.P. Vs. Sher Singh and others), arising out of Case Crime No.297 of 2012, Police Station Tundla, District Firozabad against the accused appellants is hereby set aside.

26. The accused-appellants, namely, Sher Singh, Arjun Singh and Sanju would be released, forthwith, unless they are wanted in any other case, subject to compliance of Section 437-A Cr.P.C./481 BNSS-2023.

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**(2024) 11 ILRA 487**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 11.11.2024**
**BEFORE**

**THE HON'BLE MANISH KUMAR NIGAM, J.**

Writ C No. 14257 of 2024

**Phoolmati ...Petitioner**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Azaz Ahmad

**Counsel for the Respondents:**
C.S.C., Karuna Srivastava, Santosh Kumar Srivastava

**Dispossession**-impugned notice issued mentioning that the petitioner is illegally occupying the house and to hand over the possession to the owner of the house-Petitioner has been dispossessed -from the possession memo, it is apparent that the possession was taken by the joint revenue and police team-Respondent No. 3-Sub-Divisional Magistrate has no authority in law to interfere with the possession of the petitioner at the behest of private respondents- admittedly a civil dispute pending - Respondent No. 3 acted against the settled law of the land -prohibiting the executive authorities from interfering with the private disputes between the parties, especially, where the suits are pending before the competent court-respondents are directed to restore the possession of the petitioner. (E-9)

**List of Cases cited:**

1. Jitendra Bahadur Singh Vs St. of U.P. & ors.-Writ C No. 50033 of 2015

2. Devmani Vs St. of U.P. & ors. in Writ C No. 17017 of 2018 decided on 06.12.2018

3. Vijai Vs St. of U.P. & ors. in Writ C No. 20102 of 2022 decided on 11.08.2022

4. Mohammad Aijaz Vs St. of U.P. & ors. in Writ C No. 19053 of 2022 on 27.07.2022

5. Rame Gowda (Dead) By Lrs. Vs M. Varadappa Naidu (Dead) By Lrs. & anr.reported in (2004) 1 SCC 769

6. Gulab Devi Vs St. of U.P. (Allahabad; reported in 2007 (2) All LJ 220

7. Bishan Das & ors. Vs The St. of U.P. & ors.; AIR 1961 SC 1570

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

1. Heard learned counsel for the petitioner, learned Standing Counsel for the State-respondents and perused the records.

2. This petition has been filed for the following reliefs:-

*"(I) A writ order or direction in the nature of certiorari to quash the impugned order dated 25.03.2024 passed by respondent No. 3.*

*(II) Issue a writ, order or direction in the nature of Mandamus directed the Respondent no.3 not to dispossess to the petitioner from the house In dispute."*

3. By means of this writ petition, the petitioner has challenged a notice dated 25.03.2024 issued by Sub-Divisional Magistrate, Nizamabad, District Azamgarh-

respondent No. 3 mentioning therein that the petitioner is illegally occupying the house situated at Gata No. 860 situated at Village- Tahbarpur, District- Azamgarh. In this regard earlier also oral and written directions have been issued to petitioner to vacate the premises and hand over the possession to the owner but the same has not been complied with. As a last warning you are directed to vacate the premises in dispute within one week and hand over the possession to the owner of the house otherwise, the premises will be vacated by force and damages for the same be also recovered. Notice dated 25.03.2024 impugned in the writ petition is quoted as under:-

*"कार्यालय उपजिलाधिकारी-निजामाबाद, आजमगढ़।*

*संख्या 145/ एस०टी० दिनांक 25 मार्च, 2024*

*नोटिस*

*श्रीमती फूलमती पत्नी गोविन्द निवासी ग्राम नवापुर पर० व तहसील निजामाबाद जनपद आजमगढ़।*

*श्री साधू पुत्र सुचित ग्राम महूवार पर० व तहसील निजामाबाद आजमगढ़ द्वारा इस आशय का प्रार्थना-पत्र प्रस्तुत किया गया है कि आपके द्वारा ग्राम तहबरपुर तहसील निजामाबाद में स्थित भूमिधरी गाटा सं० 860 में बने मकान पर अवैध कब्जा किया गया है। उक्त प्रकरण में पूर्व में आपको लिखित व मौखिक रूप से कब्जा खाली कर भवन स्वामी को सौपने हेतु कई बार निर्देशित किया गया किया जा चुका है। किन्तु आपके द्वारा ऐसा नहीं किया गया।*

*उक्त के क्रम में आपको अन्तिम रूप से सचेत किया जाता है कि, पत्र प्राप्ति के एक सप्ताह के अन्दर विवादित स्थल को छोड़कर भवन स्वामी को सुपुर्द कर दे अन्यथा की स्थिति में खाली कराया जायेगा और खाली कराने का हर्जाना वसूल किया जायेगा।*

*ह० अपठनीय*

*(सन्त रंजन)*

*उपजिलाधिकारी,*

**निजामाबाद- आजमगढ़।"**

4. Brief facts of the case as mentioned in the writ petition are that Plot No. 860 area 14 kari was recorded in the name of one Chandarbali, who had two daughters. In the year 1988, the father-in-law of the petitioner paid Rs. 3500/- to Chandarbali, the recorded tenure holder/ owner of the land for purchase of Plot No. 860, came in possession over the disputed land and has constructed a house on the said plot. The sale deed however, could not be executed as Chandarbali died. After the death of Chandarbali, name of respondent Nos. 4 to 6 was mutated in the revenue records over the plot in dispute as legal heirs. Respondent Nos. 4 to 6 wanted to dispossess the petitioner from the house in question. The petitioner, therefore, filed Original Suit No. 313 of 2024 (Phoolmati Vs. Ramchander and others) for permanent injunction in the court of Civil Judge (Junior Division) Azamgarh on 15.03.2024 and the said suit is pending between the parties. Respondent Nos. 4 to 6 moved application before the Commissioner Azamgarh, Mandal Azamgarh with the prayer that petitioner be directed to vacate the house in dispute. Thereafter, the respondent moved an application before respondent No. 3 that petitioner be directed to vacate the house in question situated at Gata No. 860 and thereafter, the order dated 25.03.2024 was passed by respondent No. 3.

5. This Court by its previous order dated 01.05.2024 stayed the order passed by the respondent No. 3 dated 25.03.2024 and directed the Sub Divisional Magistrate, Nizamabad, District Azamgarh to file his personal affidavit within a period of three weeks explaining that how such an order has been passed by Sub Divisional Magistrate, Nizamabad, District-Azamgarh and under which provision of law. Order dated 01.05.2024 passed by this Court is quoted as under:-

*"1. Heard learned Counsel for the parties and perused the record.*

*2. The present writ petition has been filed challenging the order dated 25.3.2024 passed by the S.D.M., Nizamabad, District-Azamgarh. By the order impugned, the S.D.M., Nizamabad, District-Azamgarh has directed the petitioner to vacate the house in question on a complaint made by one Sadhu.*

*3. Let the S.D.M., Nizamabad, District-Azamgarh filed his personal affidavit within a period of three weeks explaining that how such an order has been passed by the S.D.M., Nizamabad, District-Azamgarh and under which provision of law.*

*4. List this case after three weeks, as fresh.*

*5. Until further order of this case, the effect and operation of the order dated 25.3.2024 passed by the S.D.M., Nizamabad, District-Azamgarh shall remain stayed."*

6. Thereafter, the personal affidavit has been filed by respondent No. 3 on 20.05.2024. The petitioner has also filed a reply to the personal affidavit filed by respondent No. 3. In his personal affidavit, respondent No. 3 has stated that petitioner is neither a recorded owner of Plot No. 860 area 14 kari, situated in Village-Tahbarpur, District- Azamgarh as per the revenue records nor the petitioner has submitted any documentary evidence as to the sale deed executed in her favour. It has also been stated by respondent No. 3 that respondent Nos. 5 and 6 are recorded as bhumidhar over Gata No. 860 area 0.044 hectares and are co-owners of the property in dispute and their share is 14 kari and on the said area, they have constructed two rooms house and the writ petitioner has occupied one room illegally and is running her shop. In this regard, the respondents moved applications dated 01.04.2021 and 03.02.2022 before the Additional Commissioner, Azamgarh Division, Azamgarh with the prayer that Sub Divisional Magistrate, Nizamabad and the Circle Officer, Tahbarpur be directed to get the premises vacated in illegal possession of the husband of the petitioner with immediate effect and an F.I.R. may also be lodged against the persons in illegal possession. On the aforesaid applications, the Additional Commissioner passed orders on 01.04.2021 and 03.02.2022 which are annexed as Annexure Nos. P.A.3 to the personal affidavit filed by respondent No. 3. The order dated 01.04.2021 is quoted as under:-

"अतिआवश्यक/

**समयवद्ध**

*कार्यालय आयुक्त आजमढ मण्डल आजमगढ।*

*संख्या 1176 / जनसुनवाई 2021 दिनांक 01 अप्रैल 2021*

*1- उप जिलाधिकारी,*

*निजामाबाद, आजमगढ।*

*2- क्षेत्राधिकारी,*

*बूढनपुर, आजमगढ।*

*कृपया श्री साधु पुत्र सूचित ग्राम महुवार थाना तहबरपुर तहसील- निजामाबाद जनपद आजमगढ के प्रस्तुत शिकायती प्रार्थना पत्र दिनांक 01.04.2021 का आवलोकन करें, जिसमें शिकायत द्वारा यह अवगत कराया गया है कि पुस्तैनी मकान में विपक्षी गोविन्द पुत्र होरी आदि के अवैध कब्जा मकान को खाली कराने का अनुरोध की गयी है।*

*अतः प्रश्नगत प्रकरण में स्थलीय जाँच करा लें यदि जाँच में तथ्य सही पाये जाते है तो अभिलेखों के आधार पर नियमानुसार खाली कराते हुये कृत कार्यवाही से इस कार्यालय को दिनांक 25.01.2021 तक अवगत कराने का कष्ट करें।*

*संलग्न- यथोपरि।*

*ह० अपठनीय*

*(अनिल कुमार मिश्र)*

*अपर आयुक्त (प्रशासन)*

*आजमगढ मण्डल,आजमगढ़"*

Thereafter, another order dated 03.02.2022 was passed by Additional Commissioner (Judicial) Azamgarh,

Mandal Azamgarh which is also quoted as under:-

*"अनुस्मारक पत्र-1*

*कार्यालय आयुक्त, आजमगढ़ मण्डल, आजमगढ़।*

*संख्या में मों/ शि०लि०-2022*

*दिनांक 03 फरवरी,2022*

*1-उप जिलाधिकारी, निजामाबाद, आजमगढ़।*

*2- क्षेत्राधिकारी,*

*बूढ़नपुर, आजमगढ़।*

*----------*

*कृपया इस कार्यालय के पत्र संख्या-1176/क०स०-2020 दिनांक 01.04.2021 का सन्दर्भ ग्रहण करने का कष्ट करें, जिसके द्वारा श्री साधू पुत्र सूचित ग्राम-महुवार थाना-तहबरपुर तहसील-निजामाबाद जनपदं-आजमगढ़ के प्रार्थना पत्र दिनांक 05.12.2020 के सन्दर्भ में उल्लिखित तथ्यों की स्थलीय जॉच करा लें, अभिलेखों के आधार पर आवश्यक कार्यवाही कराने का अपेक्षा की गयी थीं, परन्तु प्रश्नगत प्रकरण में वांछित आख्या अनी तक आपके स्तर से प्राप्त नहीं हुई है।*

*अतः आपसे पुनः अपेक्षा किया जाता है कि इस कार्यालय के पत्र संख्या-1176/ क०स० 2020 दिनांक 01.04.2021 द्वारा की गयी अपेक्षानुसार प्रकरण में कृत कार्यवाही से दिनांक 21-02-2022 तक इस कार्यालय को अवगत कराने का कष्ट करें।*

*(हंसराज)*

*अपर आयुक्त (न्यायिक)*

*आजमगढ़ मण्डल, आजमगढ़"*

7. It has been further stated in the personal affidavit that in view of directions issued by the Additional Commissioner, Azamgarh Mandal, Azamgarh, respondent No. 3 has no option but to comply with the order passed by the higher authority i.e. Additional Commissioner, Azamgarh Mandal, Azamgarh. It has been further stated that after the spot inspection made by respondent No. 3 along with Circle Officer of the house in dispute, respondent No. 3 found illegal possession of the petitioner's husband, namely, Govind Singh s/o Hori and neither the petitioner's husband nor the petitioner had submitted any documentary evidence regarding purchase of the plot in dispute from respondent Nos. 4 and 5 or from their forefathers, namely, Chandarbali, though, they alleged that they had purchased 14 kari of land in the year 1988 from Chandarbali. It has also been stated in personal affidavit that after the spot inspection by the revenue team, it was found as Chandarbali was issueless, the property devolved upon his real brother Suchit and after the death of Suchit, his share came to his sons namely, Sadhu, respondent No. 5 and Dadhibal, successor in interest of Dadhibal respondent No. 6 and their name were also recorded in the revenue records. It is also stated that in view of these facts, respondent No. 3 has no option and in compliance of the order passed by the Additional Commissioner, has issued notice dated 25.03.2024 to the petitioner. It has been further stated that in view of these facts on 03.04.2024 the property in dispute was got vacated from the petitioner with consent of the petitioner in presence of joint team of revenue as well as police force in presence of the villagers. Copy of the spot memo dated 03.04.2024 is annexed as Annexure No. P.A. 4 to the personal affidavit and the same is quoted as under:-

*"स्पाट मेमो*

*आज दिनांक 03/04/2024 को ग्राम- तहबरपुर परगना व तहसील-निजामाबाद जनपद-आजमगढ़ के निवासी साधु पुत्ल सूचित द्वारा दिये गये शिकायती प्रार्थना-पल के निस्तारण में पक्ष-विपक्ष को श्रीमान् उपजिलाधिकारी महोदय द्वारा नोटिस जारी कर उभय पक्षों को सुना गया। जिसके क्रम में विपक्षी फूलमती पली गोविन्द द्वारा आवेदक की दुकान स्थित गाता से०-860 मि रकबा14 कड़ी पर अवैध रूप से कब्जा पाया गया। कब्जे के सम्बन्ध में कब्जेधारी कोई साक्ष्य प्रस्तुत नहीं कर पाई। उक्त के बांवत् फूलमती पत्नी गोबिन्द को मकान दुकान खाली करने हेतु एक सप्ताह का समय दिया गया। किन्तु समय सीमा बीत जाने के उपरात्त भी कब्जा नहीं खाली किया गया। अतएव आज दिनांक*

*03/04/2024 को राजस्व व पुलिस बल की संयुक्त टीम के सहयोग से श्रीमान् नायब तहसीलदार की अध्यक्षता में खाली कराकर अविदक को दे दिया गया। मौके पर अगल बगल व ग्राम के उपस्थित संम्भ्रांत व्यक्तियों के हस्ताक्षर / नि० अ० कराया गया।*

*03-04-2024.*
*ले o म o - टिकापुर"*

8. It has also been stated that because of illegal possession of the petitioner on the plot in dispute there was an apprehension of riot and for avoiding the same and to maintain law and order, with the peaceful consent of the petitioner her illegal possession was vacated by the revenue team in pursuance of the notice issued by respondent No. 3 in compliance of orders passed by Additional Commissioner. The stand taken by respondent No. 3 is in paragraph Nos. 4 to 14 of the personal affidavit and the aforesaid paragraphs are quoted as under:-

*"4.That, the petitioner is not recorded owner of the plot no. 860 area 14 Kari situated in Village Tahbarpur, District Azamgarh as per revenue record of fasli year 1426-1431 nor she has submitted any documentary evidence regarding the registered deed of the plot in dispute before the respondent as alleged. In pursuance of the orders dated 01.04.2021 and 03.02.2022 passed by the Additional Commissioner, (Judicial), Azamgarh Division, Azamgarh. For kind perusal of this Hon'ble Court a true photocopy of the katauni of fasli year 1426-1431 is being filed herewith and marked as Annexure No.P.A.-01 to this affidavit.*

*5. That, it is noteworthy that the respondent nos. 5 and 6 having the transferable rights of gata no. 860 area 0.044 hect. wherein, they are co owner of the property in dispute and their shares is 14 Kari and on that area they have constructed 2 rooms house wherein, the writ petitioner has occupied one illegally and running her shop as alleged by the respondent nos. 5 and 6 and regarding its respondent no. 5 have made the application on 01.04.2021 and 03.02.2022 before the Additional Commissioner, Azamgarh Division, Azamgarh for vacating the house illegally occupied by the husband of the petitioner namely Govind son of Hori. For kind perusal of this Hon'ble Court a true photocopy of the application dated 01.04.2021 and 03.02.2022 are being collectively filed herewith and marked ANNEXURE NO.P.A. 02 to this affidavit.*

*6. That, in pursuance of the aforesaid applications made by the respondent no. 5 the Commissioner, had passed the order on 01.04.2021 and 03.02.2022 respectively in Jan Sunwai and passed the order and directing to the deponent/respondent no.3 Sub Divisional Magistrate, Nizamabad, District Azamgarh as well as Circle officer, Tahbpur, District Azamgarh to make an enquiry regarding the illegal possession of one Govind son of Hori of the house of the applicant/ respondent no. 5 and after the spot inspection with the fact as alleged by the respondent no. 5 was found to be correct and on consent and Vancestor of petitioner the proceeding for vacating of the house in dispute was to be initiated according with the law. For kind perusal of this Hon'ble Court a true photocopy of the orders dated 01.04.2021 03.02.2022 are being collectively and filed herewith and marked as ANNEXURE NO.P.A. 03 to this affidavit.*

*7. That, in pursuance of the aforesaid direction passed by the Commissioner, Azamgarh Division, Azamgarh the deponent/ respondent no. 3 had no option except to comply the order of his higher authority Commissioner, Azamgarh Division, Azamgarh.*

*8. That, the deponent after spot inspection alongwith circle officer on the house in dispute situated at gata no. 860 area 14 Kari was found illegally encroached by the petitioner husband namely Govind son of Hori as neither the petitioner husband had submitted any documentary evidence regarding purchasing of the plot in dispute from the respondent nos. 4 and 5 of Rs. 3500/- from the fore father of the respondents namely Chandrabali nor any registered deed were produced by the husband of the petitioner or by the petitioner as alleged and as per record the respondent nos. 5 and 6 were owner of honorarium dispute.*

*9. That,it is allged by the petitioner that her husband namely Govind had purchased 14 Kari area of the plot no. 860 in year 1988 from the owner of the plot in dispute namely Chandrabali by paying Rs. 3500/- but unfortunately the Chandrabali was died and registry could not be executed which is not based on record.*

*10. That, after the spot inspection by the revenue SIO team it was found that Chandrabali had one real brother namely Suchit and Chandrabali was issue less and after his death, the share of the Chandrabali of plot in dispute was came in favour of his brother Suchit and after death of Suchit his son namely Sadhu and Dadhivar name were record in revenue record without any objection of the petitioner husband. As such from the record the respondent nos. 5 and 6 were found to be owner of the plot in dispute which is evident from the record.*

*11. That, on account of the above aforesaid facts the respondent no. 3/deponent had no option except in compliance of the order of the Commissioner, Azamgarh Division, Azamgarh had issued the notice dated 25.03.2024 in good faith without any intention of any law and jurisdiction vested in him.*

*12. That, 03.04.2024 on consequence of the order dated 01.04.2021 and 03.02.2022 passed by the Commissioner, Azamgarh Division, Azamgarh having found the illegal possession of the husband of the petitioner on the gata no. 860 of area 14 Kari which was illegally encroached by him without having any documentary evidence of her ownership/title of the plot in dispute, same was vacated by the petitioner/husband of the petitioner with their own consent in presence of the joint team of the revenue as well as police force in presence of the aforesaid Gram Sabha villagers. For kind perusal of this Hon'ble Court a true photocopy of the Spot memo dated 03.04.2024 is being filed herewith and marked as Annexure No.P.A.-4 to this affidavit.*

*13. That, since the aforesaid area was vacated by the petitioner herself on 03.04.2024 with her consent as admitted that she is in illegal possession in house in dispute in presence of the villagers and same was handed over by her to the respondent nos. 5 and 6 but the petitioner canceling this facts after vacating the plot in dispute. The petitioner has been filed Civil Suit No. 313 of 2024 (Phoolmati Vs. Ramchandra and others), on 15.03.2024 before the Civil judge (J.D.) Azamgarh raising aforesaid grievances as raised in the writ petition which is still pending as admitted by the petitioner herself in writ petition. As such the grievances of the petitioner is sub judice before the competent court hence the writ petition was not maintainable in eyes of law.*

*14. That, it is noteworthy that since on account of the illegal possession of the petitioner on the plot in dispute there*

*was an apprehension to commit the riot between the parties. On account of which avoiding the apprehension and maintaining the law and order as remain peaceful on the consent of the petitioner her illegal encroachment vacated by was the revenue team in pursuance rsuance of the aforesaid notice issued by the deponent/respondent no. 3. In good faith of compliance of the order of Commissioner. However, if any error or omission is found to be committed without due process of law by the deponent as found by this Hon'ble Court that was done in the good faith and in compliance of the order of the his higher authority as stated above without any mela fide intention against the petitioner as alleged and in obedience of the order passed by the higher authority Commissioner, Azamgarh Division, Azamgarh."*

9. In response to the personal affidavit filed by respondent No. 3, a counter affidavit has been filed by the petitioner wherein she has reiterated the averments made in the writ petition and has categorically denied that the petitioner has vacated the house in dispute by herself on 03.04.2024.

10. In the meantime, a counter affidavit has been filed on behalf of respondent Nos. 4, 5 and 6 along with stay vacation application to which a rejoinder affidavit has been filed by counsel for the petitioner. Apart from denying the claim of the petitioner in the counter affidavit and claiming their right to the property in dispute, the answering respondents have stated in paragraph No. 5 of the counter affidavit that respondent No. 5 Sadhu has given one room to the petitioner for running shop of green vegetables in the year 2014. In paragraph No. 6, it has also been stated by the answering respondents that the petitioner is in unauthorized occupant of the shop in dispute without paying rent to respondent No. 5. In the counter affidavit, the respondents have admitted the pendency of the civil suit filed by the petitioner. In paragraph No. 12 of the counter affidavit, it has been stated "petitioner not vacated the room/ shop in dispute therefore, the petitioner was dispossessed by the Revenue Authorities on 03.04.2024." In paragraph No. 12, "dispossessed by the revenue authority" has been scored off and in its place "vacated the room herself" has been written by pen and initials has also been put over the same.

11. In the rejoinder affidavit, the petitioner reiterated its claim and has denied the claim of the answering respondents. She has also denied that she has vacated the premises on own and rather it has been stated that the petitioner was dispossessed by the revenue authorities.

12. From the perusal of the case as has been brought before this Court by means of the affidavits, it is admitted position that petitioner is in possession over the property in dispute and a civil suit is pending between the rival parties. As per the petitioner, the petitioner is in possession since 1988 whereas as per the respondents, the petitioner has been put in possession as tenant by respondent No. 5 in the year 2014.

13. Be that as it may, this fact is crystal clear that the petitioner is in settled possession over the property in dispute and a civil litigation is also pending before the Civil Judge, Junior Division, which is admitted to both the parties.

14. Learned counsel for the petitioners submitted that once there is title

dispute as to the property in dispute and the matter is pending before the civil court, respondent No. 3 has no jurisdiction to interfere with the possession of the petitioner by means of a administrative order without having any force of law. In this regard the petitioner has relied upon judgment of this Court dated 04.09.2015 passed in **Writ C No. 50033 of 2015 (Jitendra Bahadur Singh Vs. State of U.P. and 5 others),** wherein Division Bench of this Court has passed the following order:-

*"Heard learned counsel for the parties and perused the record.*

*This Court has repeatedly held that the police and administrative authority must not interfere in inter se dispute between the two private parties in respect of immovable properties.*

*We have been informed that a Government Order has also been issued for the same purpose. It appears that the Sub-Divisional Magistrate, Mariahu, District Jaunpur has no respect to the orders of the Court or to the Government Order. He has issued the order for delivery of possession under the order impugned and thereafter he has issued another order for possession to be delivered and a report be submitted for compliance thereof.*

*We, therefore, direct that the Principal Secretary, Revenue to take disciplinary action against the officer concerned and to ensure that in future, no such order are issued. No leniency is to be shown.*

*A copy of this order may be forwarded to the respondent no.1 by the Standing Counsel. within a week from today and the action taken report be submitted before this Court positively by 18.9.2015.*

*Put up on 18.9.2015."*

15. Learned counsel for the petitioner further relied upon judgment of this Court in case of **Devmani Vs. State of U.P. and 6 others in Writ C No. 17017 of 2018 decided on 06.12.2018** wherein this Court has held as under:-

*"In addition to above, we find that the Sub Divisional Magistrate being an administrative Officer has no power to issue any injunction order against any private person to interfere in the possession of the other person. In case an application was filed before the Sub Divisional Magistrate in respect of the property dispute, the appropriate course open to him was ask to the parties to approach the appropriate Court to resolve their dispute. The Sub Divisional Magistrate has assumed the jurisdiction of a Civil/Revenue Court and has passed the restrain order. To our repeated query to the learned counsel for the petitioner to point out the authority of law under which the Sub Divisional Magistrate has passed the order but he failed to point out any provision of the law which cloth the administrative officer to pass the injunction order.*

*The experience reveals that the Sub Divisional Magistrates are passing such type of order in a large number of cases. We find that the orders passed by the Administrative Officer interfering in the matter of property dispute where title dispute is involved are wholly without jurisdiction. An administrative officer cannot direct the Police to help a party in title dispute."*

16. In case of **Vijai Vs. State of U.P. and 6 others in Writ C No. 20102 of 2022 decided on 11.08.2022**, this Court has held as under in paragraph Nos. 26, 27, 28, 29, 30:-

*"26. In our Constitution, there is clear separation of judicial and executive powers. The civil disputes are to be decided by the Civil Court and unsuccessful litigant has a right to file an appeal. The Administrative Officials cannot enter into any such dispute in exercise of the power conferred on them under the provisions of Cr.P.C. and the Revenue Code to fill in the gap and pass executive orders which explicitly belongs to the realms of Civil Court or the revenue court respectively. The due process of law has to be followed in all respect and the executive authorities are not supposed to usurp the the power bestowed on the civil / revenue courts as it would not only be exercise of excessive jurisdiction not permissible under law but would also lead to overlapping jurisdiction which is against the tenets of the basic structure of our Constitution.*

*27. The present case is a glaring example of encroaching and over reaching the realm of the Civil Court on the part of the respondent-authorities. Although the respondent no. 2 has taken a stand that he was not aware of the pendency of the civil appeal, but the action of the respondent no. 2 even after submission of the reports by the revenue officials does not seem convincing to this Court from any angle. The authorities concerned ought not to have exercised administrative power for entering into the disputed property and issue order for delivery of possession etc against one or the other party. This primarily should be left to the competent court of civil jurisdiction.*

*28. The very issuance of advisory by the Government of UP dated 3.8.2022 vide No. 1291/EK-2022/9-RA-9 pursuant to the Government order dated 16.10.2015 is evident of the fact that even the Government of UP is not oblivious to the exercise of excessive administrative powers by the execution in civil dispute relating to immovable properties between private individuals. It is high time that the said advisory acts like yet another reminder to all the executive authorities to desist from taking any action in a dispute relating to immovable properties of private persons and especially when the matter is pending in a civil court as in the present case.*

*29. Having noted the effort of the Government of UP in issuing the aforesaid advisory, this Court further expects that the Government should also prescribe consequential effect against the erring officers and provide for remedial steps by framing high level committee of senior officers at the Government level, which should include the Revenue Secretary so that not only accountability can be fixed but a redressal forum be available to the victims and this Court is not flooded with similar kinds of litigations in future.*

*30. For all above reasons, we are inclined to allow this writ petition. This court without expressing any view on the merits of the dispute pending before the competent courts and in the peculiar facts and circumstances of the present case directs the District Magistrate, Ghazipur and the SDM, Tehsil - Kasimabad, District - Ghazipur to ensure that the parties are restored possession as was existed prior to 11.6.2022 in order to bring them to their original position. Needless to say that such arrangement shall be subject to the out come of the civil appeal and other litigations pending between the petitioner and respondent no. 7. We clarify that we have not expressed anything on the merit of the contention of the parties, which may be permissible to the parties as per law and as such we did not find any reason to issue notice to respondent no. 7 before passing this order."*

17. In case of **Mohammad Aijaz Vs. State of U.P. and 3 others in Writ C No. 19053 of 2022 on 27.07.2022** following order was passed:-

*"Sri Ashwani Kumar Pathak, learned Advocate has put in appearance on behalf of the respondent no.4.*

*The petitioner herein is aggrieved by the order dated 25.06.2022 passed by the Additional District Magistrate (City), Gorakhpur whereby on an application moved by the respondent no.4, direction has been issued to the Lekhpal to make inquiry so that no illegal construction would be raised by the petitioner herein. The order impugned also noted that the matter is pending before the court.*

*It is argued by Sri Anoop Trivedi, learned Senior Counsel assisted by Sri Nitin Chandra Mishra, learned counsel for the petitioner that the petitioner herein is raising construction after getting a map sanctioned from the concerned development authority. Moreover, from the application moved by the respondent no.4 on 25.06.2022 itself, it was clear that the matter related to the property in question was pending before the Civil Court.*

*In the said scenario, there was no occasion for the respondent no.3 i.e. the Additional District Magistrate, Gorakhpur, District Gorakhpur to enter into the dispute. The proper course of action for the respondent no.3 was to relegate the applicant i.e. the respondent no.4 herein to approach the Civil Court.*

*Considering these submissions, having perused the application moved by the respondent no.4 and the order passed by the Additional District Magistrate (City), Gorakhpur thereon, we find substance in the submissions of the learned Senior Counsel for the petitioner.*

*We are facing influx of such writ petitions in this Court adding to our docket, where the administrative authorities are passing orders casually in private disputes relating to immovable properties and passing orders in favour of one or the other parties even where the disputes are pending before the competent court of law.*

*By the orders dated 30.06.2022 in Writ-C No.-17951 of 2022 (Shree Energy Developers Pvt. Ltd. Vs. State of U.P. and 6 others) and 20.07.2022 in Writ-C No.-20102 of 2022 (Vijai Vs. State Of U.P. And 6 Others), we had directed the Principal Secretary, Government of U.P., Lucknow and the Principal Secretary (Revenue), Government of U.P., Lucknow; respectively, to issue necessary instructions to the administrative authorities and to take remedial measures to curb this tendency. We have also directed the Principal Secretary (Revenue), Government of U.P., Lucknow to initiate disciplinary action against the erring officials.*

*Noticing the aforesaid orders, we direct the learned Standing Counsel to seek instructions from the Principal Secretary (Revenue), Government of U.P., Lucknow to intimate as to whether any remedial steps have been by him to curb such an approach of the administrative officials working under his administration and jurisdiction. Written instruction be placed before the Court on the next date fixed.*

*Let the Principal Secretary, Government of U.P., Lucknow shall also file his response to bring before the Court the steps taken by him to restrain the administrative authorities from causally entering into any private dispute relating to the immoveable property on the application of one or the other warring faction on one or other pretext.*

*This order be intimated to the Principal Secretary, Government of U.P.,*

*Lucknow, by the learned Chief Standing Counsel within 24 hours.*

*Let this matter be posted in the additional cause list on 11.08.2022.*

*On the next date, the affidavit of the Principal Secretary, Government of U.P., Lucknow shall be filed in compliance of this order.*

*By the next date fixed, the administrative authorities are restrained from entering into the property-in-question in any manner."*

18. Learned counsel for the petitioner further relied upon a Government order dated 01.12.2014 issued by the Chief Secretary, Government of Uttar Pradesh, which is quoted as under:-

"संख्या-491रिट / छः-पु-3-2014-2(94)पी /2014

प्रेषक,

आलोक रंजन,

मुख्य सचिव,

उत्तर प्रदेश शासन

सेवा में,

समस्त जिला मैजिस्ट्रेट, उ०प्र०,

समस्त वरिष्ठ पुलिस अधीक्षक / पुलिस अधीक्षक, उ०प्र० ।

गृह (पुलिस) अनुभाग-3

लखनऊ : दिनांक : 01 दिसम्बर, 2014

विषय :- निजी पक्षों *(private parties)* के मध्य अचल सम्पत्ति विवाद से संबंधित प्रकरणों पर प्रशासनिक अधिकारियों द्वारा विधि अनुसार कार्यवाही किये जाने के सम्बन्ध में।

महोदय,

यह संज्ञान में आया है कि निजी पक्षों (private parties) के मध्य अंचल सम्पत्ति के विवादों के कतिपय प्रकरणों, जो सम्बन्धित न्यायालय में लम्बित हैं / विचाराधीन थे तथा जिनमें न्यायालय द्वारा अंतरिम आदेश पारित है, में प्रशासनिक एवं पुलिस अधिकारियों द्वारा अपने क्षेत्राधिकार के परे जाकर आदेश पारित कर दिया गया है तथा कब्जा हस्तान्तरण भी कर दिया गया है। इस प्रकार से निर्णय लिये जाने पर मा० उच्च न्यायालय द्वारा अत्यन्त रोष व्यक्त किया गया है। इस सम्बन्ध में मा० न्यायालय ने रिट याचिका संख्या - 43827 / 2014 सईद खान बनाम् उ०प्र० राज्य व 03 अन्य (जनपद बरेली) के प्रकरण. में दिनांक 3-11-2014 को निम्नवत् आवेश पारित किया है :

*Additional City Magistrate in his Affidavit has referred to the Government Orders dated 15.5.2012, 30.4.2013 and 7.6.2014 as the source of power for entering into the dispute between two private. persons in respect of immovable property and in interpreting the interim order passed by the Civil Court.*

*Prima facie, we are of the opinion that such reading of the Government Order by the Additional City Magistrate is wholly perverse. A Government Order deals with the removal of difficulties of citizens of this country, which they face in the matter of getting their work done in various government Organizations/Departments of Uttar Pradesh. These Government Orders do not authorize any authority of the state to enter into any private dispute of two persons.*

*Learned Standing Counsel is directed to obtain instructions from Chief Secretary, Government of U.P., as to whether the Additional City Magistrate in the garb of Government Orders referred to above is permitted to enter into private disputes during the "Janata Darshan" etc. or not."*

2- इसके अतिरिक्त एक अन्य रिट याचिका संख्या-55049 / 2014 गौरव यादव बनाम् कमिश्नर, कानपुर भण्डल एवं 04 अन्य के प्रकरण में भी मा० न्यायालय द्वारा दिनांक 14-10-2014 को इसी प्रकार रोष प्रकट किया गया है।

3- जन समस्याओं का निराकरण शासन की सर्वोच्च प्राथमिकता है, जिसके लिए समय-समय पर दिशा-निर्देश भी निर्गत किये गये हैं। इस सम्बन्ध में यह स्पष्ट किया जाता है कि निजी व्यक्तियों के मध्य अचल सम्पत्ति के विवाद सम्बन्धी प्रकरण, जो दीवानी न्यायालय मा० उच्च न्यायालय अथवा अन्य न्यायालयों में लम्बित हैं या जिनमें मा० न्यायालय द्वारा अंतरिम आदेश पारित हैं, में प्रशासनिक एवं पुलिस अधिकारियों द्वारा विधि अनुसार ही कार्यवाही की जायेगी और क्षेत्राधिकार से परे कोई आवेश नहीं दिया

जायेगा । दीवानी प्रकृति के प्रकरणों में अधिकारिता युक्त न्यायालय ही आदेश पारित करने में सक्षम है।

4- स्पष्ट किया जाता है कि ऐसे प्रकरणों में शांति व्यवस्था बनाये रखने का दायित्व प्रशासनिक एवं पुलिस अधिकारियों पर ही है। यह भी स्पष्ट किया जाता है कि न्यायालय के आदेशों का सम्यक् अनुपालन कराना सुनिश्चित किया जाय, किन्तु सरकारी / सार्वजनिक सम्पत्ति पर अवैध कब्जा, अतिक्रमण या उसका दुरूपयोग कदापि नहीं होने दिया जायेगा । यह सुनिश्चित करने का दायित्व प्रशासनिक एवं पुलिस अधिकारियों व अन्य विभागीय अधिकारियों का होगा।

5- उक्त आदेशों का कड़ाई से अनुपालन सुनिश्चित किया जाय।"

Learned counsel for the petitioner further relied upon another order dated 16.09.2015 has been issued by the Chief Secretary, Government of Uttar Pradesh in this regard and the same is quoted as under:-

*"प्रेषक,*

*सुरेश चन्द्रा,*
*प्रमुख सचिव,*
*उ०प्र०शासन।*

*सेवा में,*

*1. समस्त मण्डलायुक्त,*
*उत्तर प्रदेश।*
*2. समस्त जिला मजिस्ट्रेट / कलेक्टर,*
*उत्तर प्रदेश।*
*राजस्व अनुभाग-9*

*लखनऊः दिनांक 16 सितम्बर, 2015*

*विषयः रिट याचिका (सी) संख्या 50033 आफ 2015 जितेन्द्र बहादुर सिंह बनाम उ०प्र० राज्य व अन्य में मा० उच्च न्यायालय, उ०प्र० इलाहाबाद द्वारा पारित आदेश दिनांक 04.09.2015 के अनुपालन के संबंध में।*

*महोदय,*

*मा० उच्च न्यायालय द्वारा रिट याचिका संख्या- 50033 आफ 2015 जितेन्द्र बहादुर सिंह बनाम राज्य व अन्य में दिनांक 04.09.2015 को निम्न आदेश पारित किये गये हैं:-*

*"Heard learned counsel for the parties and perused the record. This Court has repeatedly held that the police and administrative authority must not interfere in inter se dispute between the two private parties in respect of immovable properties.*

*We have been informed that a Government Order has also been issued for the same purpose. It appears that the Sub-Divisional Magistrate, Mariahu, District Jaunpur has no respect to the orders of the Court or to the Government Order. He has issued the order for delivery of possession under the order impugned and thereafter he has issued another order for possession to be delivered and a report be submitted for compliance thereof.*

*We, therefore, direct that the Principal Secretary, Revenue to take disciplinary action against the officer concerned and to ensure that in future, no such order are issued. No leniency is to be shown.*

*A copy of this order may be forwarded to the respondent no.1 by the Standing Counsel. within a week from today and the action taken report be submitted before this Court positively by 18.9.2015."*

*2- उल्लेखनीय है कि पूर्व में मुख्य सचिव, उ०प्र० शासन, गृह (पुलिस) अनुभाग-3 के शासनादेश संख्या-491 रिट छः-पु-3-2014-2(94) पी/2014, दिनांक 01.12.2014 द्वारा इस विषय पर पूर्व में विस्तृत निर्देश प्रसारित किये गये हैं। ऐसा प्रतीत हो रहा है कि उक्त निर्देशों का पालन नहीं किया जा रहा है।*

***3- इस संबंध में मुझे यह कहने का निदेश हुआ है कि मा० उच्च न्यायालय के आदेश दिनाँक 04.09.2015 का अक्षरशः अनुपालन करते हुए यह सुनिश्चित किया जाय कि निजी पक्षकारों के मध्य अचल सम्पत्ति के ऐसे प्रकरणों जिनमें वाद सक्षम न्यायालय में विचाराधीन है अथवा जिनमें मा० न्यायालयों द्वारा अन्तरिम आदेश पारित किये गये हों, में प्रकीर्ण प्रार्थनापत्रों पर प्रशासनिक आदेश पारित न किये जाय। यदि भविष्य में ऐसा कोई प्रकरण शासन के संज्ञान में आता है तो इसे अत्यन्त गम्भीरता से लिया जायेगा तथा इसके लिए दोषी अधिकारियों के विरूद्ध कठोर दण्डात्मक कार्यवाही की जायेगी।***

*भवदीय,*

*(सुरेश चन्द्रा चन्द्रा )*
*प्रमुख सचिव ।*

*संख्या- 10-650(1)/एक-9-15-रा-9, तद्दिनांकित,*

*प्रतिलिपि निम्नलिखित को सूचनार्थ एवं आवश्यक कार्यवाही हेतु प्रेषितः-*

*1- प्रमुख सचिव, गृह विभाग, उ०प्र० शासन को इस अनुरोध के साथ प्रेषित कि मा० न्यायालय के उक्त आदेशों के अनुपालन में पुलिस अधिकारियों को निर्देश जारी करने का कष्ट करें।*

*2- प्रमुख सचिव, प्रशासनिक सुधार विभाग, उ०प्र० शासन।*

*3- आयुक्त एवं सचिव राजस्व परिषद, उ०प्र० लखनऊ,*

*4- गार्ड फाइल।*

*आज्ञा से,*
*ह० अपठनीय*
*(जय प्रकाश सगर)*
विशेष सचिव ।"

Learned counsel for the petitioner also relied upon another Government Order Dated 03.08.2022 has been issued by the Chief Secretary, Governmet of U.P. and which is quoted as under:-

*"प्रेषक,*

*सुधीर गर्ग,*
*प्रमुख सचिव,*
*उ०प्र० शासन।*

*सेवा में,*

*1- समस्त मण्डलायुक्त,*
*उत्तर प्रदेश।*
*2- समस्त जिला मजिस्ट्रेट / कलेक्टर,*
*उत्तर प्रदेश।*

*राजस्व अनुभाग-9 लखनऊः*
*दिनांकः ०3 अगस्त, 2022*

*विषयः मा० उच्च न्यायालय इलाहाबाद में योजित रिट सी० सं०-20102/2022, विजय बनाम उ०प्र० राज्य व 06 अन्य (जनपद गाजीपुर) में पारित आदेश दिनांक 20.07. 2022 एवं रिट सी० सं०-19053/2022, मो० एजाज बनाम उ०प्र० राज्य व 03 अन्य (जनपद गोरखपुर) में पारित आदेश दिनांक 27.07.2022 के अनुपालन के सम्बन्ध में।*

*महोदय,*

*कृपया पूर्व में निर्गत राजस्व अनुभाग-9 के शासनादेश सं०-डब्ल्यू-650/एक-9-2015-रा-9, दिनांक 16.09.2015 का संदर्भ ग्रहण करने का कष्ट करें, जिसके माध्यम से निर्देश दिये गये थे कि मा० उच्च न्यायालय इलाहाबाद में योजित रिट याचिका सं0-50033/2015, जितेन्द्र बहादुर सिंह बनाम उ०प्र० राज्य व अन्य में पारित आदेश दिनांक 04.09.2015 का अक्षरशः अनुपालन कराते हुए यह सुनिश्चित किया जाय कि निजी पक्षकारों के मध्य अचल सम्पत्ति के ऐसे प्रकरणों जिनमें वाद सक्षम न्यायालय में विचाराधीन है अथवा जिनमें मा० न्यायालयों द्वारा अन्तरिम आदेश पारित किये गये हों, में प्रकीर्ण प्रार्थनापत्रों पर प्रशासनिक आदेश पारित न किये जाय।*

*2- उल्लेखनीय है कि पूर्व में मुख्य सचिव, उत्तर प्रदेश शासन गृह (पुलिस) अनुभाग-3 के शासनादेश सं0-491 रिट/छः-पु-3-2014-2(94)पी/2014, दिनांक 01.12.2014 द्वारा इस विषय पर विस्तृत निर्देश प्रसारित किये गये हैं।*

*3- शासन के संज्ञान में आया है कि उक्त निर्देशों का कड़ाई से अनुपालन नहीं किया जा रहा है, जिससे मा० न्यायालयों में विभिन्न याचिकाएं योजित हो रही है तथा शासन को असहज स्थिति का सामना करना पड़ रहा है। इस सम्बन्ध में अवगत कराना है कि मा० उच्च न्यायालय इलाहाबाद में योजित रिट सी० सं०-20102/2022, विजय बनाम उ०प्र० राज्य व 06 अन्य में मा० न्यायालय द्वारा पारित आदेश दिनांक 20.07.2022 सुसंगत अंश निम्नवत है:-*

*The District Magistrate, Ghazipur and Sub Divisional Magistrate, Kasimabad, Ghazipur are hereby called upon to file their personal affidavits to explain as to how they had entered into the dispute between the private persons relating to the immovable property, that too during the pendency of the proceeding between the parties before the Civil Court. Looking to above, the Principal Secretary (Revenue), Government of U.P., Lucknow is further directed to take action against the erring officers by initiating disciplinary proceedings against them.*

*मा० उच्च न्यायालय इलाहाबाद में योजित एक अन्य याचिका रिट सी० सं0-19053/2022, मो० एजाज बनाम*

उ०प्र० राज्य व 03 अन्य में मा० न्यायालय द्वारा पारित आदेश दिनांक 27.07.2022 सुसंगत अंश निम्नवत है:-

*Let the Principal Secretary, Government of U.P., Lucknow shall also file his response to bring before the Court the steps taken by him to restrain the administrative authorities from causally entering into any private dispute relating to the immoveable property on the application of one or the other warring faction on one or other pretext.*

***4- इस सम्बन्ध में मुझे यह कहने का निदेश हुआ है कि प्रश्नगत रिट याचिकाओं में पारित मा० न्यायालय के आदेश दिनांक 20.07.2022 तथा 27.07.2022 का अक्षरशः अनुपालन सुनिश्चित किया जाय। किन्हीं निजी पक्षकारों के मध्य अचल सम्पत्ति के ऐसे प्रकरणों जिनमें वाद सक्षम न्यायालय में विचाराधीन है अथवा जिनमें मा० न्यायालयों द्वारा अन्तरिम आदेश पारित किये गये हों, में प्रकीर्ण प्रार्थनापत्रों पर प्रशासनिक आदेश पारित न किये जाय और न ही प्रशासनिक आधार पर प्रकरणों में कोई हस्तक्षेप किया जाय। यदि भविष्य में ऐसा कोई प्रकरण शासन के संज्ञान में आता है तो इसे अत्यन्त गंभीरता से लिया जायेगा एवं इसके लिए दोषी अधिकारियों के विरूद्ध कठोर दण्डात्मक कार्यवाही की जायेगी। उपरोक्त निर्देशों का कड़ाई से अनुपालन सुनिश्चित किया जाय।***

***उक्त के अतिरिक्त यह भी कहने का निदेश हुआ है कि किसी सक्षम न्यायालय में वाद विचाराधीन न होने की दशा में यदि कानून व्यवस्था के आलोक में कहीं हस्तक्षेप करने की आवश्यकता पड़ रही हो तो उ०प्र० राजस्व संहिता-2006, दण्ड प्रक्रिया संहिता-1973 एवं अन्य सम्बन्धित संगत अधिनियमों, विनियमों आदि द्वारा प्रदत्त शक्तियों का प्रयोग करते हुए ही मर्यादित / संयमित हस्तक्षेप किया जाय।***

भवदीय,
ह० अपठनीय
(सुधीर गर्ग) प्रमुख सचिव ।

संख्या- (1)/एक-9-2022-रा-9 एवं दिनांक तदैव।

प्रतिलिपि निम्न को सूचनार्थ एवं आवश्यक कार्यवाही हेतु प्रेषित।

1- अपर मुख्य सचिव, गृह विभाग, उ०प्र० शासन को इस अनुरोध के साथ प्रेषित कि मा० न्यायालय के उक्त आदेशों के अनुपालन में पुलिस अधिकारियों को निर्देश जारी करने का कष्ट करें।

2- प्रमुख सचिव, प्रशासनिक सुधार विभाग, उ०प्र० शासन। 3- आयुक्त एवं सचिव, राजस्व परिषद उ०प्र०, लखनऊ।

4- जिलाधिकारी गोरखपुर एवं गाजीपुर।

5- गार्ड फाइल।

आज्ञा से,
(महेन्द्र सिंह)
विशेष सचिव ।"

19. Learned counsel for the petitioner further submitted that admittedly, the petitioner was in possession over the property in dispute and a civil litigation was pending before the competent civil court and by means of administrative orders and by sheer use of force, the petitioner was dispossessed by the administrative authorities at the behest of private respondents, which is not sustainable.

20. Learned counsel for the State submitted that it is correct that the order impugned was passed by respondent No. 3 in his administrative capacity but the possession was handed over by the petitioner with his consent and therefore, it cannot be said that the petitioner was dispossessed because of the orders passed by administrative authorities, particularly, respondent No. 3 as she herself has surrendered the possession.

21. This fact has been seriously controverted by the petitioner that she never gave consent or handed over possession with her consent. It has further contended that the possession was forcefully taken by the revenue authorities with the help of police as well as private respondents. In this regard, the petitioner has referred to the possession memo dated 03.04.2024 which has been filed by respondent No. 3 along with his personal affidavit.

22. From the perusal of the possession memo which is quoted above, there is no mention in the aforesaid memo that the petitioner handed over possession with her consent, rather it mentions that with the help of revenue and police force in the presence of Naib Tehsildar, the premises in dispute was got vacated and was given to the applicant (respondents). There is no mention in the memo of possession that the possession was handed over by the petitioner with her consent.

23. Learned counsel for the petitioner further submitted that on an application moved by respondent No. 5-Sadhu dated 07.03.2024, which has been filed by respondent No. 5 along with his counter affidavit, Sub Divisional Magistrate passed an order dated 07.03.2024 directing the Naib Tehsildar, S.H.O., Revenue Inspector and Lekhpal to vacate the property in dispute and to comply with earlier orders. The aforesaid application has been annexed by the answering respondents as Annexure No. C.A.3 to the counter affidavit over which the order dated 07.03.2024 has been endorsed. **Respondent No. 3 in his personal affidavit has not disclosed this order dated 07.03.2024 and has deliberately concealed the same.**

24. Learned Standing Counsel further contended that aforesaid action was taken by respondent No. 3 in compliance of the orders passed by Additional Commissioner and for maintenance of law and order which might be disturbed because of illegal occupation of the petitioner and in rebuttal to the same, learned counsel for the petitioner contended that there was no threat of any riot and there was no law and order situation because of the possession of the petitioner. It has been further contended by learned counsel for the petitioner that no proceedings under the Cr.P.C. were undertaken by respondent No. 3 for maintenance of law and order and the respondent cannot take shelter to the law and order situation in order to save himself from the illegal action taken by him by dispossessing the petitioner without recourse to law and that too without drawing any proceedings civil or criminal against the petitioner.

25. Learned counsel appearing for the private respondents submitted that petitioner being tenant, she was not paying rent, therefore, was an unauthorized occupant of the premises in dispute and was liable to be dispossessed and no illegality has been committed by the respondents to get the possession from the petitioner, who is an illegal occupant. It has also been contended by learned counsel appearing for the private respondents that the suit filed by the petitioner is of no consequence as the petitioner is an illegal occupant without any title to the property.

26. The aforesaid contention of learned counsel for the private respondent is wholly misconceived. The Supreme Court in case of **Rame Gowda (Dead) By Lrs. Vs. M. Varadappa Naidu (Dead) By Lrs. and another** reported in **(2004) 1 SCC 769** held occupant in settled possession cannot be dispossessed without recourse to law. It has been held that in India, persons are not permitted to take forcible possession; they must obtain such possession as they are entitled to through a Court. A person in peaceful possession is entitled to retain his possession and in order to protect such possession he may even use reasonable force to keep out a trespasser. The law will come to the aid of a person in

peaceful and settled possession by injuncting even a rightful owner from using force or taking law in his own hands, and also by restoring him in possession even from the rightful owner (of course subject to the law of limitation), if the latter has dispossessed the prior possessor by use of force. A rightful owner who has been wrongfully dispossessed of land may retake possession if he can do so peacefully and without the use of unreasonable force.

Paragraph Nos. 4, 5, 6, 7, 8, 9, 10 of the judgment in case of Rame Gowda (supra) are quoted as under:-

*"4. It is contended by the learned counsel for the defendant-appellant that the suit filed by the plaintiff was based on his title. The suit itself was defective inasmuch as declaration of title was not sought for though it was in dispute. Next, it is submitted that if the suit is based on title and if the plaintiff failed in proving his title, the suit ought to have been dismissed without regard to the fact that the plaintiff was in possession and whether the defendant had succeeded in proving his title or not. We find no merit in both these submissions so made and with force.*

*5. Salmond states in Jurisprudence (Twelfth Edition),*

*"few relationships are as vital to man as that of possession, and we may expect any system of law, however primitive, to provide rules for its protection. . . . . .. Law must provide for the safeguarding of possession. Human nature being what it is, men are tempted to prefer their own selfish and immediate interests to the wide and long-term interests of society in general. But since an attack on a man's possession is an attack on something which may be essential to him, it becomes almost tantamount to an assault on the man himself; and the possessor may well be stirred to defend himself with force. The result is violence, chaos and disorder." (at pp. 265, 266).*

*"In English Law possession is a good title of right against anyone who cannot show a better. A wrongful possessor has the rights of an owner with respect to all persons except earlier possessors and except the true owner himself. Many other legal systems, however, go much further than this, and treat possession as a provisional or temporary title even against the true owner himself. Even a wrongdoer, who is deprived of his possession, can recover it from any person whatever, simply on the ground of his possession. Even the true owner, who takes his own, may be forced in this way to restore it to the wrongdoer, and will not be permitted to set up his own superior title to it. He must first give up possession, and then proceed in due course of law for the recovery of the thing on the ground of his ownership. The intention of the law is that every possessor shall be entitled to retain and recover his possession, until deprived of it by a judgment according to law." (Salmond, ibid, pp. 294-295) "Legal remedies thus appointed for the protection of possession even against ownership are called possessory, while those available for the protection of ownership itself may be distinguished as proprietary. In the modern and medieval civil law the distinction is expressed by the contrasted terms petitorium (a proprietary suit) and possessorium (a possessory suit)." (Salmond, ibid, p.295)*

*6. The law in India, as it has developed, accords with the jurisprudential thought as propounded by Salmond. In Midnapur Zamindary Co. Ltd. Vs. Kumar Naresh Narayan Roy and Ors. 1924 PC 144, Sir John Edge summed up the Indian*

*law by stating that in India persons are not permitted to take forcible possession; they must obtain such possession as they are entitled to through a Court.*

*7. The thought has prevailed incessantly, till date, the last and latest one in the chain of decisions being Ramesh Chand Ardawatiya Vs. Anil Panjwani (2003) 7 SCC 350. In-between, to quote a few out of severals, in Lallu Yeshwant Singh (dead) by his legal representative Vs. Rao Jagdish Singh and others (1968) 2 SCR 203, this Court has held that a landlord did commit trespass when he forcibly entered his own land in the possession of a tenant whose tenancy has expired. The Court turned down the submission that under the general law applicable to a lessor and a lessee there was no rule or principle which made it obligatory for the lessor to resort to Court and obtain an order for possession before he could eject the lessee. The court quoted with approval the law as stated by a Full Bench of Allahabad High Court in Yar Mohammad Vs. Lakshmi Das (AIR 1959 All. 1,4), "Law respects possession even if there is no title to support it. It will not permit any person to take the law in his own hands and to dispossess a person in actual possession without having recourse to a court. No person can be allowed to become a judge in his own cause."*

*In the oft- quoted case of Nair Service Society Ltd. Vs. K.C. Alexander and Ors. (1968) 3 SCR 163, this Court held that a person in possession of land in assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner. When the facts disclose no title in either party, possession alone decides. The court quoted Loft's maxim 'Possessio contra omnes valet praeter eur cui ius sit possessionis (He that hath possession hath right against all but him that hath the very right)' and said, (AIR p. 1175, para 20)*

*"A defendant in such a case must show in himself or his predecessor a valid legal title, or probably a possession prior to the plaintiff's and thus be able to raise a presumption prior in time".*

*In M.C. Chockalingam and Ors. Vs. V. Manickavasagam and Ors. (1974) 1 SCC 48, this Court held that the law forbids forcible dispossession, even with the best of title. In Krishna Ram Mahale (dead) by his Lrs. Vs. Mrs. Shobha Venkat Rao (1989) 4 SCC 131, it was held that where a person is in settled possession of property, even on the assumption that he had no right to remain on the property, he cannot be dispossessed by the owner of the property except by recourse to law. In Nagar Palika, Jind Vs. Jagat Singh, Advocate (1995) 3 SCC 426, this Court held that disputed questions of title are to be decided by due process of law, but the peaceful possession is to be protected from the trespasser without regard to the question of the origin of the possession. When the defendant fails in proving his title to the suit land the plaintiff can succeed in securing a decree for possession on the basis of his prior possession against the defendant who has dispossessed him. Such a suit will be founded on the averment of previous possession of the plaintiff and dispossession by the defendant.*

*8. It is thus clear that so far as the Indian law is concerned the person in peaceful possession is entitled to retain his possession and in order to protect such possession he may even use reasonable force to keep out a trespasser. A rightful owner who has been wrongfully dispossessed of land may retake possession if he can do so peacefully and without the use of unreasonable force. If the trespasser*

*is in settled possession of the property belonging to the rightful owner, the rightful owner shall have to take recourse to law; he cannot take the law in his own hands and evict the trespasser or interfere with his possession. The law will come to the aid of a person in peaceful and settled possession by injuncting even a rightful owner from using force or taking law in his own hands, and also by restoring him in possession even from the rightful owner (of course subject to the law of limitation), if the latter has dispossessed the prior possessor by use of force. In the absence of proof of better title, possession or prior peaceful settled possession is itself evidence of title. Law presumes the possession to go with the title unless rebutted. The owner of any property may prevent even by using reasonable force a trespasser from an attempted trespass, when it is in the process of being committed, or is of a flimsy character, or recurring, intermittent, stray or casual in nature, or has just been committed, while the rightful owner did not have enough time to have recourse to law. In the last of he cases, the possession of the trespasser, just entered into would not be called as one acquiesced to by the true owner.*

*9. It is the settled possession or effective possession of a person without title which would entitle him to protect his possession even as against the true owner. The concept of settled possession and the right of the possessor to protect his possession against the owner has come to be settled by a catena of decisions. Illustratively, we may refer to Munshi Ram and Ors. Vs. Delhi Administration (1968) 2 SCR 455, Puran Singh and Ors. Vs. The State of Punjab (1975) 4 SCC 518 and Ram Rattan and Ors. Vs. State of Uttar Pradesh (1977) 1 SCC 188. The authorities need not be multiplied. In Munshi Ram & Ors.'s case (supra), it was held that no one, including the true owner, has a right to dispossess the trespasser by force if the trespasser is in settled possession of the land and in such a case unless he is evicted in the due course of law, he is entitled to defend his possession even against the rightful owner. But merely stray or even intermittent acts of trespass do not give such a right against the true owner. The possession which a trespasser is entitled to defend against the rightful owner must be settled possession, extending over a sufficiently long period of time and acquiesced to by the true owner. A casual act of possession would not have the effect of interrupting the possession of the rightful owner. The rightful owner may re-enter and re- instate himself provided he does not use more force than is necessary. Such entry will be viewed only as resistance to an intrusion upon his possession which has never been lost. A stray act of trespass, or a possession which has not matured into settled possession, can be obstructed or removed by the true owner even by using necessary force. In Puran Singh and Ors.'s case (supra), the Court clarified that it is difficult to lay down any hard and fast rule as to when the possession of a trespasser can mature into settled possession. The 'settled possession' must be (i) effective, (ii) undisturbed, and (iii) to the knowledge of the owner or without any attempt at concealment by the trespasser. The phrase 'settled possession' does not carry any special charm or magic in it; nor is it a ritualistic formula which can be confined in a strait-jacket. An occupation of the property by a person as an agent or a servant acting at the instance of the owner will not amount to actual physical possession. The court laid down the following tests which may be adopted as a working rule for determining the attributes of 'settled possession' :*

*i) that the trespasser must be in actual physical possession of the property over a sufficiently long period;*

*ii) that the possession must be to the knowledge (either express or implied) of the owner or without any attempt at concealment by the trespasser and which contains an element of animus possidendi. The nature of possession of the trespasser would, however, be a matter to be decided on the facts and circumstances of each case;*

*iii) the process of dispossession of the true owner by the trespasser must be complete and final and must be acquiesced to by the true owner;*

*and*

*iv) that one of the usual tests to determine the quality of settled possession, in the case of culturable land, would be whether or not the trespasser, after having taken possession, had grown any crop. If the crop had been grown by the trespasser, then even the true owner has no right to destroy the crop grown by the trespasser and take forcible possession.*

*10. In the cases of Munshi Ram and Ors.(supra) and Puran Singh and Ors. (supra), the Court has approved the statement of law made in Horam Vs. Rex AIR 1949 Allahabad 564, wherein a distinction was drawn between the trespasser in the process of acquiring possession and the trespasser who had already accomplished or completed his possession wherein the true owner may be treated to have acquiesced in; while the former can be obstructed and turned out by the true owner even by using reasonable force, the latter, may be dispossessed by the true owner only by having recourse to the due process of law for re-acquiring possession over his property."*

27. In case of **Gulab Devi Vs. State of U.P. (Allahabad; reported in 2007 (2) All LJ 220**, the Division Bench of this Court has held that Executive Magistrate cannot decide the civil rights of the parties by passing executive orders. By the impugned order, the petitioner has been dispossessed from the disputed property, which cannot be legally done by the Sub Divisional Magistrate concerned. Since the civil suit is pending before the competent court, therefore, both the parties have right to get suitable interim orders for the management, preservation or protection of the property in dispute. Paragraph Nos. 4, 4A, 5, 6, 7 and 8 of the judgment in case of Smt. Gulab Devi (supra) is quoted as under:-

*"4. The impugned order Annexure-1 to the writ petition has been passed by the Sub-Divisional Magistrate, Barsana district Mathura in his executive capacity. The learned counsel for the petitioner has argued that in the worse case this order can be presumed to have been passed under Section 145, Criminal Procedure Code but we do not agree with this contention. Nowhere the law provides for passing such order in the executive capacity, even if for a moment, it is presumed that this order has been passed under Section 145/146, Criminal Procedure Code even then it is illegal because the prescribed procedure was not followed and the petitioner was not given opportunity to be heard. Moreover, by the impugned order the petitioner has been dispossessed from the disputed property which cannot be legally done by the Sub Divisional Magistrate concerned. During the argument also, learned Counsels for the respondent No. 4 admitted the legal position and termed this order to be illegal.*

*4A. Since the Civil Suit is pending before the competent Court, there fore, both the parties have right to get suitable interim orders for the management, preservation and protection of the property in dispute. The Civil Court is also empowered to decide the dispute in respect to the possession also, for this purpose the parties can approach the said Court.*

*5. The learned counsel for the respondent No. 4 has contended that there was serious dispute between the parties regarding possession, Pooja and Rajbhog etc. of the temple and police had submitted such report that there was apprehension of breach of peace, therefore, the learned Sub Divisional Magistrate, Chhata Mahura has passed the impugned order. But this argument has no legs to stand. For the apprehension of breach of peace, the Executive Magistrate/Police is empowered to proceed under Section 107, Criminal Procedure Code or in the worse case under Section 145, Criminal Procedure Code .*

*6. In the case of* ***Jilubhai Nanbhai Khachar v. State of Gujarat, AIR 1995 Supreme Court 142,*** *the Hon'ble Apex Court has opined that the State Government cannot while taking recourse to the executive power of the State under Article 162 of the Constitution of India, deprive a person of his property. Such power can be exercised only by authority of law and not by a mere executive fiat or order.*

*7. In the case of* ***Ved Prakash v. State of U.P, 2006 (2) JTC 177****, the Division Bench of this Court has also clearly held that the Executive Magistrate cannot decide the civil rights of the parties by passing executive order. In the said case Sub Divisional Magistrate, Charra, district Aligarh had passed order allowing the Opp. Parties of The petitioner that case to raise construction on the disputed land with the help of the police.*

*8. In view of above, we are of the opinion that the impugned order is wholly illegal and if it is allowed to continue this will seriously affect the civil rights of the parties, therefore, this writ petition is allowed and the impugned order passed by respondent No. 2, Sub Divisional Magis trate, Chhata, Mathura is set aside. If the parties are so advised, they may move the Civil Court concerned for getting suitable order in the matter."*

28. The Constitutional Bench of the Supreme Court in case of **Bishan Das and others Vs. The State of U.P. and others; AIR 1961 SC 1570,** had deprecated the State action to divest a citizen from his or her property without adopting due course of law, to quote:

*"13.... It is enough to say that they are bona fide in possession of the constructions in question and could not be removed except under authority of law. The respondents clearly violated their fundamental rights by depriving them of possession of the dharmasala by executive orders. Those orders must be quashed and the respondents must now be restrained from interfering with the petitioners in the management of the dharmasala, temple and shops. A writ will now issue accordingly.*

*14..... As pointed out by this Court in Wazir Chand v. The State of Himachal Pradesh (1), the State or its executive officers cannot in- terfere with the rights of others unless they can point to some specific rule of law which authorises their acts. In Ram Prasad Narayan Sahi v. The State of Bihar (2) this Court said that nothing is more likely to drain the vitality from the rule of law than legislation which singles out a particular individual from his*

*fellow subjects and visits him with a disability which is not imposed upon the others. We have here a highly discriminatory and autocratic act which deprives a person of the possession of property without reference to any law or legal authority. Even if the property was trust property it is difficult to see how the Municipal Committee, Barnala, can step in as trustee on an executive determination only. The reasons given for this extraordinary action are, to quote what we said in Sahi's case (supra), remarkable for their disturbing implications."*

*29. Learned counsel for the petitioner invited attention of the Court to the report submitted by the Lekhpal dated 10.06.2022 annexed as Annexure No. 2 to the writ petition wherein it has been mentioned by the Lekhpal that, because of personal dispute, the application for possession has been moved, on which no action can be taken at the Tehsil level and the applicant has been informed to file a suit for eviction as per law and to get the possession vacated at Tehsil level will not be accordance with law.*

*30. From the respective arguments of the counsel for the parties, the factual background and the law laid down by the Supreme Court as well as this Court, it is clear that petitioner was in possession over the house/shop in question and has been dispossessed in pursuance of order passed by respondent No. 3 by the revenue team and there is no material on record except an averment in the affidavit that the possession was handed over by the petitioner herself. Rather from the possession memo, it is apparent that the possession was taken by the joint revenue and police team. Respondent No. 3 has also concealed the order dated 07.03.2024 which has been filed by the private respondents along with their counter affidavit from this Court as the same has not been mentioned in the personal affidavit. Respondent No. 3 has no authority in law to interfere with the possession of the petitioner at the behest of respondent Nos. 4 to 6. There is admittedly, a civil dispute pending before the competent civil court. Even the Tehsildar has reported that it will not be proper for the revenue authorities to interfere. Respondent No. 3 acted against the settled law of the land, the Government Orders issued by the State Government prohibiting the executive authorities from interfering with the private disputes between the parties, especially, where the suits are pending before the competent court.*

31. In my view, respondent No. 3 has violated the law of land as laid down by the Apex Court as well as this Court and has also violated the Government Orders dated 01.12.2014, 16.09.2015, 03.08.2022 issued by the State Government and has deliberately interfered with the rights of the petitioner. Before referring this matter to the Chief Secretary, Government of Uttar Pradesh for taking action against the respondent No. 3 in view of the Government Orders dated 01.12.2014, 16.09.2015, 03.08.2022 as well as law laid down by the Apex Court and also this Court, it will be proper that he may be given a last opportunity to explain his conduct before this Court.

32. Respondent No. 3 is directed to be present before this Court on 26.11.2024 and explain why matter be not referred to the Chief Secretary, Government of Uttar Pradesh for taking action in accordance with law referred above for interfering with the rights of the petitioner and violating the orders passed by State Government referred above.

33. So far as submission of learned Standing Counsel that respondent No. 3 acted in compliance of order passed by Additional Commissioner and Additional Commissioner has not been made party in the present petition, the petitioner is directed to implead the Additional Commissioner (Administration) Azamgarh Mandal, Azamgarh, who has passed the order dated 01.04.2021 and Additional Commissioner (Judicial) who has passed the order dated 03.02.2022 as party respondent.

34. The newly impleaded respondent Nos. 7 and 8 shall also file their personal affidavit explaining how such orders were passed by them by the next date fixed.

**35. Since the petitioner has been illegally dispossessed, the respondents are directed to restore the possession of the petitioner over the shop/ house in dispute within a period of ten days from today.**

36. Learned Standing Counsel is directed to communicate this order to respondent No. 3 as well as respondent Nos. 7 and 8 for necessary compliance.

37. Office to supply a copy of this order free of cost to learned Standing Counsel for necessary compliance.

38. List this case as fresh on 26.11.2024 at Serial No.1.

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**(2024) 11 ILRA 508**
**APPELLATE JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 14.11.2024**

**BEFORE**

**THE HON'BLE RAJAN ROY, J.**
**THE HON'BLE OM PRAKASH SHUKLA, J.**

First Appeal No. 122 of 2023

**Dinesh Verma @ Dinesh ...Appellant**
**Versus**
**Smt. Malti Verma @ Malti Devi ...Respondent**

**Counsel for the Appellant:**
Mohd. Yasin

**Counsel for the Respondent:**
Rakesh Kumar, Arun Kumar

**(A) Family Law - Divorce proceedings - Hindu Marriage Act, 1955 - Sections 13 - grounds for divorce, Section 19 (1) - Appeals, Section 28 - Code of Civil Procedure, 1908 - Section 11 - Res Judicata, Order II Rule 2 - Suit to include the whole claim, Domestic Violence Act, 2005 - Section 12 - relief sought by the aggrieved woman - Principle of res judicata - A fresh and subsequent cause of action permits filing a second matrimonial case even when an earlier case was dismissed on similar grounds - Second matrimonial case is not barred if it is based on a new cause of action.(Para - 16,17)**

**(B) Word or Phrases - Cause of action - a bundle of facts constituting the right of a party which he or she has to establish in order to obtain a relief from a Court - same has to be tested on the anvil of evidence led by the parties.(Para 16)**

First matrimonial suit was by appellant - for dissolution of marriage with respondent - dissolved on the ground of desertion - Appellant filed second divorce petition - after first petition was dismissed - second case alleged subsequent acts of cruelty by respondent - based on a subsequent and fresh cause of action – issue - maintainability of second divorce petition – applicability of principle of res judicata. (Paras 3, 9, 10,16)

**HELD: -** Second matrimonial case for divorce on ground of cruelty and desertion not hit by principle of res judicata as it is based on new and subsequent cause of action. Second divorce petition was maintainable. Impugned judgment was set aside. Matter was remitted to the Family Court for fresh consideration. (Para - 17, 18)

**Appeal allowed.** (E-7)

**List of Cases cited:**

St. of Maha. & anr. Vs M/s National Construction Comp., Bom. & anr., AIR 1996 SC 2367

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

(1) Heard Shri Mohd. Yasin, learned Counsel representing the appellant-husband and Shri Rakesh Kumar, learned Counsel representing the respondent-wife.

(2) This appeal under Section 19 (1) of the Family Court Act, 1984 read with Section 28 of the Hindu Marriage Act, 1955 has been filed by the appellant against the judgment and decree dated 07.04.2023 passed by the Principal Judge, Family Court, Ambedkar Nagar in Matrimonial Case No. 287 of 2021 : *Dinesh Vs. Malti Devi*, whereby the learned Family Court has dismissed the matrimonial case filed by the appellant for dissolution of marriage under Section 13 of the Hindu Marriage Act, 1955 on the ground of being barred by the principle of *res judicata*.

(3) The factual matrix of the case, along with the record of multiple legal proceedings between the parties, is summarised as under :-

A) The appellant is the husband and the respondent is the wife. Their marriage was solemnized on 07.06.1993 in accordance with Hindu Rites and Customs. But it appears that there were problems from the very inception for which appellant blames not only the respondent but her family members too.

B) It is on 26.04.2005 that the appellant filed a Matrimonial Case No. 93 of 2005 : *Dinesh Vs. Malti Devi*, under Section 13 of the Hindu Marriage Act, 1955 (hereinafter referred to as **'First Matrimonial Case'**) for dissolution of marriage against the respondent mainly on the ground of desertion. This matrimonial case was, however, dismissed by the Family Court, Ambedkar Nagar vide order dated 28.02.2013 predicated on a reasoning that desertion on the part of the respondent was not proved by the appellant.

C) Feeling aggrieved by the said judgment and decree dated 28.02.2013, the husband/appellant preferred First Appeal No. 42 of 2013 *: Dinesh Vs. Smt. Malti Devi* before this Court. A learned Single Judge of this Court, after appraising the judgment and decree dated 28.02.2013 and the evidence on record, returned a finding that though the suit filed by the appellant itself was not maintainable as per the averment made therein inasmuch as the appellant himself has averred in the said suit that the respondent/wife had refused to live with the appellant on 25.04.2005 and admittedly the said suit was presented on 26.04.2005, meaning thereby that the suit was presented within two years, which is not as per the provision of Section 13 of the Hindu Marriage Act, 1955, although the Family Court had not dismissed the suit on the aforesaid ground but on another ground that desertion on the part of the respondent was not proved by the appellant, the learned Single Judge of this Court dismissed the aforesaid first appeal vide judgment and order dated 11.10.2017 on the said ground of non-maintainability of the suit.

D) The appellant, almost after two and half years from the date of the

aforesaid judgment and order dated 11.10.2017, again filed a Matrimonial Case No. 287 of 2021 for dissolution of marriage under Section 13 of the Hindu Marriage Act, 1955 (hereinafter referred to as **'Second Matrimonial Case'**). The appellant, besides levelling almost identical allegations as were made in the earlier case, also alleged in this case that the wife/respondent had filed a case under Section 12 of the Domestic Violence Act, in which Judicial Magistrate, vide order dated 13.06.2012, gave a slew of directions, including payment of lump sum amount of Rs.20,000/- as litigation cost, Rs.2000/- per month towards maintenance and a right to be provided accommodation in favour of the respondent-wife. According to the appellant, he had complied with the aforesaid order dated 13.06.2012 and in compliance therewith had also provided to the respondent a room in his house, wherein, while living in the said room, cruelty has been inflicted by the respondent on 04.09.2020, at about 12:00 noon. It was stated by the appellant that on the said fateful day and time, when mother of the appellant was alone, the respondent and her brother-in-law Narendra Verma and his brother Phool Chanda came and without any rhyme or reason, hurled abuses against appellant's mother and sister and also beat them up with kicks and fists and also broke various household items. According to the appellant, when alarm was raised by his mother and sister, villagers rushed to the place of occurrence, whereupon, all the assailants, including the respondent ran away using Vehicle No. U.P. 45-W-5556. This incident was reported by the appellant's mother at police station Aliganj, upon which N.C.R. No. 20 of 2020, under Sections 323, 427 and 504 I.P.C. was lodged on 08.09.2020 at Police Station Aliganj. Thus, it has been alleged by the appellant that cause of instituting the second suit arose subsequent to the dismissal of the earlier suit/appeal. It has also been stated that appellant and respondent are residing separately in the same premises in village Hithuri, Daudpur, district Ambedkar Nagar.

E) In the second matrimonial case, notice was issued to the wife/respondent. In response thereof, the wife/respondent appeared before the Family Court and filed written statement, wherein while reiterating the factum of first matrimonial case of divorce filed by the appellant, has denied the allegations made in the second matrimonial case regarding cruelty, however, it has been admitted by the respondent/wife that in pursuance to the order dated 13.06.2012 passed under Section 19 of the Domestic Violence Act, she is residing in a two room set accommodation in her matrimonial house. It was also stated that since the first matrimonial case filed by her husband/ appellant for dissolution of marriage was dismissed by the Family Court and the same was affirmed by the appellate Court, therefore, the second case filed by the appellant for dissolution of marriage was liable to be dismissed.

F) The record reveals that in the second matrimonial case filed by the appellant, wife/respondent filed an application under Section 24 of the Hindu Marriage Act, 1955, which was allowed by the Family Court vide order dated 17.12.2021 and the husband/appellant has been directed to pay Rs.500/- per appearance to his wife/respondent towards litigation expenditure, transportation and other expenditure. Thereafter, on 12.07.2022, following four issues were framed by the Family Court in the suit :-

1. Whether respondent is legally wedded to petitioner ?

2. Whether respondent has deserted the petitioner for more than last two years ?

3. Whether respondent has continuously treated the petitioner with cruelty ?

4. Whether petitioner is entitled to any relief ?"

G) Parties led evidence before the trial Court on the issues framed. In support of his case, appellant/husband examined himself as P.W.1 and his mother, namely, Smt. Prema, as P.W.2, whereas respondent/wife got her statement recorded as D.W.1 and her brother, namely, Phoolchand Verma as D.W.2.

H) The Family Court, instead of dealing with each issue referred hereinabove, considered the issue whether the second matrimonial case is barred by principles of res judicata or not ?.

I) On considering this issue, the learned Family Court has returned a finding that the plaintiff/appellant filed first matrimonial case against the defendant/respondent under Section 13 of the Hindu Marriage Act, 1955 for dissolution of marriage, which was dismissed by the Family Court and affirmed by the First Appellate Court and further the plaintiff has filed the second matrimonial case again against his wife, complaining about the selfsame facts ever since their marriage except that of a single incident which allegedly took place on 04.09.2020, which appears to be part of the same sequence of events which were involved in the first suit, hence the learned Family Court has returned a finding that the second matrimonial case was hit by Section 11 of Code of Civil Procedure and is barred by the principle of *res judicata*. Only on this ground, the Family Court has dismissed the second matrimonial case filed by the appellant under Section 13 of the Hindu Marriage Act, 1955 vide judgment and decree dated 07.04.2023. It is this judgment and decree dated 07.04.2023, which has been challenged by the appellant/husband in the present first appeal.

(4) Shri Mohd. Yasin, learned Counsel representing the appellant has argued on the facts of the present case as narrated herein above and additionally he submitted that after lodging of the complaint at police station, an N.C.R. No. 20 of 2020, under Sections 323, 427, 504 I.P.C. was registered, wherein after due investigation, the police has also submitted a charge-sheet on 05.08.2021. Submission is that there was continuous harassment/cruelty by the wife/respondent and as such the appellant/husband was constrained to file the second matrimonial case for dissolution of marriage on the ground of cruelty and also desertion, hence the findings of the Family Court that the second matrimonial case filed by the appellant for divorce under Section 13 of the Hindu Marriage Act, 1955 is barred by the principle of *res judicata*, is unsustainable.

(5) Per contra, Shri Rakesh Kumar, learned Counsel representing the respondent/wife has argued that the second matrimonial case for divorce is a clear abuse of process of law and the principle of *res judicata* clearly applies to the case at hand since the appellant had filed the first matrimonial case for divorce on the ground of desertion and the same was dismissed and affirmed by this Court. It has also been argued by the learned counsel that the respondent/wife has also filed a case under Section 125 of Code of Criminal Procedure, which got dismissed for want of prosecution. Thereafter, the respondent/ wife has filed a case under Domestic

Violence Act against her husband/appellant, which was allowed. The appellant's mother also lodged complaint against the respondent, which was registered as N.C.R. and the same is pending before the trial Court.

(6) The crux of the submission of the learned counsel was that once the grounds as pleaded in the first matrimonial case for divorce had already been rejected and the same was affirmed by the First Appellate Authority, the same could not be agitated afresh by way of the second matrimonial case for divorce. It has been asserted that facts and issues raised in the second matrimonial case were directly and substantially in issue in the earlier case, therefore, the subsequent case is barred by the principle of *res judicata*. It has also been submitted that the present case also does not disclose any cause of action and is, thus, not maintainable. Hence, the Family Court has rightly dismissed the second matrimonial case for divorce on the ground of *res judicata*.

(7) Having regard to the rival contentions of the learned Counsel for the parties and going through the evidence on record available before this Court in the present appeal as well as the impugned judgment and decree passed by the Family Court, this Court finds that the point for determination in this appeal firstly is as to whether the present divorce case i.e. Case No. 287 of 2021 is hit/barred by principle of *res judicata*, since the appellant had earlier filed a divorce petition and the same was dismissed and appeal against it was dismissed and suit was also dismissed albeit on grounds other than given by trial Court and, secondly, whether judgment of the Family Court is sustainable ?. If the answer is in the negative, then, the point for determination would be as to whether the appellant is entitled to a decree of divorce on the ground of cruelty or desertion, as claimed.

(8) Appellant had filed first matrimonial suit, bearing No. 93 of 2005, seeking grant of a decree of divorce under Section 13 of the Hindu Marriage Act, 1955 on 26.04.2005, stating therein that he was married to the respondent on 07.06.1993 according to Hindu rites and customs. In para-2 of the first matrimonial suit, it was alleged that after marriage, the respondent came to live with the appellant but her behaviour towards the appellant and his family members was cruel and she was not able to perform household work due to some defect on his left hand. In paras 3 and 4, it was alleged that respondent did not co-operate in performing the household work and the respondent wanted to live separately with the appellant and when the appellant did not listen the respondent, then, she threatened to go to her parental house. In para-5 and 6, it was alleged that after great efforts respondent agreed to live with the appellant and in the meantime, he gave loan of Rs.50,000/- to the brother of the respondent, namely, Phool Chandra and after paying this amount, the respondent came to matrimonial house but her behaviour was again cruel. In para-7, it was alleged that after about two months, the respondent again went to parental home. In para 10 and 11, it was alleged that inspite of several efforts made by the appellant, she did not come back and on 25.04.2005, the respondent refused to perform her marital obligation and refused to go for settlement. Thus, the cause of action shown in para-11 of the plaint was dated 25.04.2005 when respondent refused to lived with the appellant, whereas first matrimonial suit was presented on

26.4.2005 i.e. immediately after the cause of action accrued to the appellant on the ground of desertion i.e. within prescribed period of two years. Apparently, the suit seeking decree of divorce could have been presented only after expiry of two years from the actual date of desertion, however, the trial Court had not considered the first matrimonial suit for divorce on this ground but had returned a finding that desertion on the part of the respondent was not proved by the appellant. In this backdrop, the first matrimonial suit was dismissed by the Family Court vide judgment and order dated 28.02.2013. However, in First Appeal No. 42 of 2013 filed by the appellant against the judgment and order dated 28.02.2013, the learned Single Judge of this Court had considered the aforesaid ground i.e. the first matrimonial suit was filed by the appellant within the prescribed period of two years, which is contrary to the legal provision of Section 13 of the Act, 1955. Also while considering it, the learned Single Judge had returned a finding that evidence on record did not prove that the respondent had deserted the appellant and further the respondent had made allegation of cruel treatment and also demand of dowry on account of which she lived part. In this backdrop, the learned Single Judge dismissed the aforesaid appeal vide judgment and order dated 11.10.2017.

(9) On 15.07.2021 i.e. after about eight years from the date of dismissal of the first matrimonial suit, the appellant filed second matrimonial suit, bearing No. 287 of 2021, for grant of decree of divorce, reiterating the almost identical pleadings of first matrimonial suit in paras 1 to 10 in the second matrimonial suit, however, in para-11 to 24, different pleadings were made. In para 11, it was alleged that though on 26.04.2005, appellant had filed first matrimonial case on 26.04.2005 under Section 13 of the Act, 1955 and before filing it, in order to not pay the amount of Rs.50000/- given by the appellant to the respondent's brother, namely, Phool Chandra, the respondent had lodged a F.I.R. on 17.03.2005 with concocted story. In para-15, it was alleged that the respondent had filed a case under Section 12 of the Domestic Violence Act in which Judicial Magistrate, vide order dated 13.06.2012, gave a slew of directions, including payment of lump sum amount of Rs.20,000/- as litigation cost, Rs.2000/- per months towards maintenance and a right to be provided accommodation in favour of the respondent-wife. Appellant had complied the aforesaid order dated 13.06.2012 and in compliance therewith, the appellant had also provided to the respondent a room in his house, wherein respondent is living. In para-16, it was alleged that while living in said accommodation, cruelty has been inflicted by the respondent on 04.09.2020 at about 12:00 noon. On this fateful day and time, when mother of the appellant was alone, the respondent and her brother-in-law Narendra Verma and his brother Phool Chandra came and without any rhyme or reason, hurled abuses against appellant's mother and sister and also beat them up with kicks and fists and also broke various household items. When alarm was raised by his mother and sister, villagers rushed to the place of occurrence, whereupon all the assailants, including the respondent ran away using Vehicle No. U.P. 45-W-5556. This incident was reported by the appellant's mother at police station Aliganj, upon which N.C.R. No. 20 of 2020, under Sections 323, 427 and 504 I.P.C. was lodged on 08.09.2020 at Police Station Aliganj. In para-19, appellant has alleged that since 2005, appellant and respondent

are residing separately and since then there is no cohabitation or relationship between them. In para-21, it was alleged that the cause of action for filing second matrimonial suit for divorce arose on 27.06.2021 when the respondent refused to give consent for divorce on mutual consent.

(10) Having regard to the aforesaid facts and circumstances of the case, what this Court find is that first matrimonial suit i.e. Suit No. 93 of 2005 was by the appellant for dissolution of marriage with the respondent. The marriage was sought to be dissolved on the ground of desertion in the first matrimonial suit, while in the second suit i.e., Divorce Case no. 287 of 2021 the marriage is sought to be dissolved between the same appellant and the respondent on the grounds of continuous cruelty and desertion.

(11) The principle of *re judicata* has been codified under Section 11 of the Code of Civil Procedure, which reads as follows:

**"11. Res judicata**.- No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim litigating under the same title in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

(12) The principle enunciated in Section 11 of Code of Civil Procedure provides that no Court should try any “suit” or "issue" in which the matter directly and substantially in issue has been directly and substantially decided in a formal suit. The stress would be on the term "issue" used under Section 13 of the Hindu Marriage Act, 1955.

(13) Section 13 of the Hindu Marriage Act, 1955 provides for grant of divorce in certain cases. It enacts that any marriage solemnized whether before or after the commencement of the Act may be dissolved on a petition presented either by the husband or by the wife on any of the grounds specified therein. Clause (ia) of sub-section (1) of Section 13 of Hindu Marriage Act, 1955 declares that a decree of divorce may be passed by a Court on the ground that after the solemnization of marriage, the opposite party has treated the petitioner with cruelty

(14) From the bare reading of the above provision, it appears that the principles of re judicata under Section 11 of the Code of Civil Procedure is based on the rule of law that a ground shall not be fixed for one and the same cause. The only thing the Court has to see is that whether new suit is in fact founded upon a cause of action distinct from the foundation of the former suit.

(15) Even if the second suit under consideration would have been filed on some other ground, which was not a ground in the earlier suit for dissolution of marriage, yet, by virtue of application of Order II Rule 2 of the Code of Civil Procedure, he could not have succeeded because the new suit is in fact founded upon the same cause of action, as has been held by the Supreme Court in the case of **State of Maharastra and Anr. Vs. M/s National Construction Company, Bombay and Anr.,** reported in AIR 1996 SC 2367. Paragraph 9 of the judgment reads as under :

*".....Both the principle of res judicata and Rule 2 of Order 2 are based on the rule of law that a man shall not be twice vexed for one and the same cause. In the case of Mohd. Khalil Khan v. Mahbub Ali Khan, AIR 1949 PC at p.86, the Privy Council laid down the tests for determining whether Order 2 Rule 2 of the Code would apply in a particular situation. The first of these is, "whether the claim in the new suit is in the fact founded upon a cause of action distinct from that which was the foundation for the former suit." If the answer is in the affirmative, the rule will not apply. This decision has been subsequently affirmed by two decisions of this Court in Kewal Singh v. Lajwanti, AIR 1980 SC 161 at p.163: (1980) 1 SCC 290 and in Inacio Martins's case (1993) AIR SCW 2163) (supra)."*

(16) In present case, apparently, the first matrimonial case for dissolution of marriage filed by the appellant under Section 13 of the Hindu Marriage Act, 1955 was filed on the grounds of cruelty and desertion. In para-11 of the first matrimonial suit, the appellant had stated that cause of action in filing first matrimonial suit accrued on 25.04.2005 when the respondent refused to perform her marital obligation and refused to go for settlement. Whereas in the second matrimonial suit i.e. Matrimonial Suit No. 287 of 2021, in para-21, the appellant has asserted that cause of action in filing the second matrimonial case arose on 27.06.2021 when the respondent finally refused for dissolution of marriage before the Court. Moreso, the second matrimonial suit is based on a subsequent and fresh cause of action relating to the infliction of cruelty and desertion on a subsequent date and as such the second divorce petition is very much maintainable and the principle of res judicata does not apply. It has to be reminded that "cause of action" means a bundle of facts constituting the right of a party which he or she has to establish in order to obtain a relief from a Court and the same has to be tested on the anvil of evidence led by the parties. In the present case, there is no adjudication on the fresh/subsequent cause of action, which has been raised by the appellant in the second matrimonial case. No doubt, the appellant raised the ground of cruelty and desertion and filed the present/second case for dissolution of marriage, however, it is apparent from a plain reading of the second matrimonial case for divorce that the cause of action pleaded was different in the earlier suit and as such this Court does not find any legal impediment in maintainability of the second matrimonial case for divorce on the grounds of *res judicata.*

(17) In view of the aforesaid discussion, our decision on the point of determination in this appeal is that the second matrimonial case for divorce on ground of cruelty and desertion is not hit by the principle of *res judicata* as it is based on new and subsequent cause of action.

(18) Accordingly, the present appeal is allowed. The impugned judgment and decree dated 07.04.2023 is hereby set-aside. The matter is remitted to the Family Court, Ambedkar Nagar for deciding it afresh, in accordance with law.

(19) Since the second matrimonial case i.e. case No. 287 of 2021 : *Dinesh Vs. Malti Devi* is of the year 2021, we hope and trust that the Family Court, Ambedkar Nagar shall make an earnest endeavour to consider and decide the same within a period of eight months from the date of

receipt of a copy of this order. It is clarified that the parties shall not seek unnecessary adjournment before the Family Court.

(20) Registry to transmit the trial Court's record to the Family Court, Ambedkar Nagar along with a copy of this order for information and compliance forthwith.

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**(2024) 11 ILRA 516**
**APPELLATE JURISDICTION**
**CRIMINAL SIDE**
**DATED: LUCKNOW 07.11.2024**

**BEFORE**

**THE HON'BLE ATTAU RAHMAN MASOODI, J.**
**THE HON'BLE AJAI KUMAR SRIVASTAVA-I, J.**

Criminal Appeal No. 413 of 2001

**Mata Prasad & Ors. ...Appellants**
**Versus**
**State of U.P. ...Respondent**

**Counsel for the Appellants:**
Arun Sinha, Ashish Raman Mishra, Maneesh Kumar Singh, Navita Sharma

**Counsel for the Respondent:**
Govt. Advocate

**(A) Criminal Law - Criminal Procedure Code, 1973 - Sections 161, 207 & 313 - Indian Penal Code, 1860 - Sections 147, 148, 149, 302, 300 & 304** - Appeal – against conviction & sentence – offence of murder – FIR – allegation that, accused appellants armed with Pharsa, ballam, lathi assaulted the father-in-law of the informant - investigation – trial by session judge – conviction & sentence – Evaluation of evidence - court finds that, (i) there is no contradiction in the testimony of prosecution witnesses on any point, as such, the truthfulness of factual matrix cannot be doubt in the absence of any material evidence to the contrary – (ii) the ground of enmity, ground of interested witnesses and ground of delay in lodging FIR does not stand to appeal which is proved beyond the reasonable doubt – (iii) antemortem injuries found on the body of deceased indicate that they were caused by the Pharsa, ballam and lathi as such the medical evidence corroborates with the ocular evidence – (iv) The surviving appellants were armed with lathi and they only wants to cause bodily injuries to the deceased and they were not having any intention to kill the deceased – held, on appreciation of peculiar facts and circumstances of the case, instead of conviction of the surviving appellants under section 302 r/w 149 IPC is concern offence would be punishable u/section 304 part 1 of the IPC – Appeal is partly allowed – impugned conviction and sentence is liable to be altered and modified – directions issued accordingly. (Para – 32, 35, 39, 45, 48, 49, 50, 51, 53, 54)

**Appeal Partly Allowed.** (E-11)

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

1. Heard learned counsel for the appellants, learned A.G.A. for the State and perused the material on record.

2. During the course of hearing of this appeal, the appellant nos. 1 and 2 namely Mata Prasad and Bhurey @ Dinesh Kumar have died and the appeal insofar as it relates to them has been abated vide order dated 11.7.2023 and 16.8.2023 respectively. Thus, the appeal survives on behalf of these appellants namely Pappu, Puttan and Daddan(appellant nos. 3, 4 and 5) only.

## (A) Prelude

3. By means of this criminal appeal, the appellants, out of whom, only appellant nos. 3, 4 and 5(hereinafter referred to as appellants) survive have challenged the judgment and order dated 26.5.2001 by which learned Sessions Judge, Bahraich in sessions trial no. 25 of 1999 arising out of

case crime no. 318 of 1998, under Sections 147, 148, 149 and 302 I.P.C., police station Ikauna, district Shrawasti has convicted them under Sections 302/149 I.P.C, and sentenced to undergo imprisonment for life with a stipulation of fine of Rs.5000/- each and further to undergo rigorous imprisonment for a period of two years in default of payment of fine. In addition, appellants namely Pappu, Puttan and Daddan were also convicted under Section 147 I.P.C. and sentenced to undergo one year's R.I. with stipulation of fine of Rs. 500/- each. In default of payment of fine a further R.I. of three months. All the sentences are directed to run concurrently.

4. The prosecution case, in nutshell, is that the complainant namely Smt. Meera Devi submitted a tahrir(exhibit ka-1) on 23.9.1998 at 10.00 p.m. in the police station alleging therein that on 23.9.1998 at 5.30 p.m. the accused appellants namely Mata Prasad armed with pharsa, Bhoorey alias Dinesh Kumar armed with ballam and rest of the accused namely Pappu, Puttan and Dadan armed with lathis were sitting near the 'Dhabli' of one Nankoo Tiwari and while her father-in-law was going to his agricultural field from his house they all started assaulting him and dragged him to the door of Chhotkau Kurmi where they again assaulted him with lathi, ballam and pharsa. The complainant on hearing the scream reached at the place of occurrence. The other persons namely Nand Kumar, Mahipal and several villagers also reached there. On being reprimanded by theses persons, the accused appellants ran away from the spot. The complainant with the help of villagers brought the deceased at the door of Kailash Nath Pradhan where he succumbed to the injuries. The report of the incident was registered as case crime no. 318 of 1998, under Sections 147, 148, 149 and 302 I.P.C. at police station Ikauna, district Shrawasti and was entered in the G.D. No. 32(Exhibit ka-3).

5. Inquest report of the dead body was prepared by the Investigating Officer(P.W. 4) and the postmortem was conducted by P.W. 6 who noted the following antemortem injuries on the body of the deceased :-

*(i) Larger abraded contusion on right outer front of abdomen and adjacent part of back size 26 cm x 12.5 c.m.*

*On opening abdominal cavity about 2 litres of blood found. Liver raptured*

*(ii) 3 cm X 1.5 cm abraded contusion left side forehead just about left eyebrow.*

*(iii) 1.5 cm incised wound mid-part of back of left forearm.*

*(iv) 8.0 c.m. x 6.0 cm contusion dorsum of right hand, on deeper dissection, outer three metacorpals found fractured.*

*(v) 7.00 cm x 5.5 cm contusion dorsum of left hand*

*(vi) Larger abraided contusion over back and sides of lower half of right upper arm and uper half of right forearm. Size 28.0 cm X 8.0 cm on deeper dissection right humerous fractured near lower end.*

*(vii) Incised wound size 1.5 cm X 0.5 cm outer side right arm lower part 7 cm above the elbow joint.*

*(viii) 7.5 Incised would front of left leg 12.0 c. above the ankle joint*

*(ix) 4.0 cm. incised wound front of right leg 13 cm above the ankle joint.*

*(x) 3.5 cm long incised wound inner side right foot 7 cm in front of medial malleolus.*

In the opinion of the doctor deceased died due to shock and

hemorrhage as a result of antemortem injuries.

6. After lodging the F.I.R., the police started investigation in the the matter and submitted charge-sheet against all the accused persons under Sections 147, 148, 149 and 302 I.P.C. After taking cognizance on the charge-sheet, the case was committed to the court of sessions where the statements of the appellants were recorded under Section 313 Cr.P.C. The accused appellants pleaded that they are innocent and have been implicated on account of previous enmity. They claimed trial.

7. In the trial the prosecution examined the following witnesses which are as under :-

P.W. 1 Mahipal, P.W. 2 complainant Meera Devi, P.W. 3 Sri Nand Kumar, P.W. 4 the Investigating Officer Yogendra Nath Tripathi, P.W. 5 Constable C.P. 58 Subhash Chandra Yadav and P.W. 6 Dr. Vijay Gorla.

8. The witness Abdul Sattar, Advocate has been examined as D.W.-1 from the side of defence.

9. We have heard learned counsel for the appellant and learned A.G.A. for the State and carefully gone through the material available on record.

**Submissions on behalf of the appellants**

10. Learned counsel for the appellants has submitted that the incident is stated to have occurred on 23.9.1998 at 5.30 p.m. whereas the F.I.R. was registered after 4.30 hours of the incident i.e. at 10.00 p.m. for which the explanation offered by the prosecution is not convincing. Learned counsel states that there is long standing enmity between the parties due to which they have been falsely implicated in this case. The injuries found on the body of the deceased do not support the prosecution case.

**Submissions on behalf of the State.**

11. Per contra, learned Additional Government Advocate contended that all the prosecution witnesses have supported the prosecution case. There is no material contradictions between the contents of the F.I.R. and the statements of the prosecution witnesses. The injuries found on the dead body of the deceased corroborate with the weapons which are stated to be caused by the accused appellants. He has also submitted that there is no conflict between the medical evidence and ocular evidence. Thus, the conviction of the appellants does not suffer from any infirmity and the appeal is liable to be dismissed.

12. Having considered the rival contentions and having perused the evidence on record, it is necessary to briefly discuss the prosecution evidence adduced during trial.

**Gist of Prosecution Witnesses**

13. P.W. 1 Mahipal in his examination-in-chief has stated that on 23.9.1998 at 5.30 p.m. while he was returning from the flour mill he heard the noise of the daughter-in-law(P.W. 2) of the deceased and therefore he ran towards her. P.W. 3 Nand Kumar also came there. He saw that all the five accused were assaulting the deceased Baijnath in the galiyara existing in between the house of Koiley Pasi and Chhotkau Kurmi. Accused

appellant Mata Prasad was assaulting the deceased with pharsa, Bhoorey @ Dinesh Kumar was assaulting with ballam and other three accused were assaulting with lathi. On alarm being raised by the said witnesses, the accused ran away to the east towards their house. They lifted the deceased and brought him near the pakaria tree and got him laid down. This pakaria tree exists in front of the houses of Mohan and Pradhan. The deceased died after some time. The complainant Meera Devi i.e. P.W. 2 got a tahrir scribed through one Indrajit and went to police station along-with Hansram, brother of Chaukidar. The police came at night and recorded their statements and in the next morning, the police inspected the spot and prepared the site-plan. Blood had fallen at the place where the deceased was assaulted.

14. In his cross examination, P.W. 1 has stated that on the date of incident while he was returning from the flour mill of Bhabhuti Lal, on the way, he having heard the noise of the appellant rushed to the spot where he saw that the the complainant Meera Devi, P.W. 2 was standing in the galiyara existing in between the house of Koiley Pasi and Chhotkau Kurmi and she was crying and when she ran towards the galiyara, he also rushed towards the house of Chhotkau Kurmi where he saw that the accused appellant Bhurey @ Dinesh Kumar armed with ballam and accused Mata Prasad armed with Pharsa were assaulting the deceased. P.W.1 with the help of P.W. 3 and the other villagers brought the deceased below the Pakariya tree. On being asked by the P.W. 2, the deceased was brought at the door of Kailash for the treatment as there was no member in the house of the deceased. He also stated that when he lifted the body of the deceased blood was oozing from the body and near the Pakaria tree where the deceased had been laid down some blood had also fallen.

15. P.W. 2 in his examination-in-chief has stated that on 28.10.1999 at 5.30 pm. her father-in-law was going from his house to see the paddy crop. Having heard the scream of the deceased near the Dhabli of Nankoo crying, she rushed towards the spot and saw that all the five accused appellants were assaulting the deceased and catching hold of his hand were dragging him towards east. The accused appellants assaulting and dragging brought her deceased father-in-law in the galiyara existing between the house of Chhotkau Kurmi and Koiley Pasi. Accused Matha Prasad armed with pharsa, Bhurey @ Dinesh Kumar armed with ballam and rest of the three persons were assaulting the deceased. She has stated that the P.W. 1 and P.W. 3 also reached at the place of occurrence. On being admonished by these witnesses, the accused ran away towards east. The deceased was standing while he was being assaulted and later on he fell down and the accused appellants again assaulted the deceased. Accused Bhurey @ Dinesh Kumar was the son of accused Matha Prasad and rest of the accused are sons of Bhurey @ Dinesh Kumar. The deceased was alive for some time. The accused appellants brought the deceased in the galiyara existing between Chhotkau Kurmi and Koiley Pasi. She got the tahrir of the occurrence scribed by Indrajit and went to the police along-with Hansram brother of Chaukidar and submitted the tahrir. The Investigating Officer recorded the statement of the witnesses in the night and on the next date he inspected the spot and collected blood stained soil also. P.W. 2 has stated that for the last about 15 years, civil litigation was going on between the deceased and the accused.

16. In his cross examination, P.W. 2 has also stated that some others persons had also gathered at the time of assault along-with the P.W. 1 and P.W. 3 and saw the occurrence. The accused appellant Bhurey @ Dinesh Kumar from one hand was dragging the deceased and from the other hand he was assaulting him and rest of the accused appellants were also assaulting the deceased. The accused Bhrey @ Dinesh Kumar armed with ballam, accused appelalnt Mata Prasad armed with Pharsa. P.W. 2 has not specified the weapon ballam but has stated that size of iron part in ballam was about one hand. Accused Bhurey @ Dinesh Kumar dragging him brought in the galiyara existing between the house of Koiley Pasi and Chhotkau Kurmi. All accused were assaulting the deceased.

17. P.W. 3 in his examination-in- chief has stated that on the date of incident i.e. 23.9.1998 at about 5.30 p.m. having heard the noise of the deceased Baijnath and his daughter-in law he rushed to the spot. The complainant P.W. 2 was present on the spot. He reached behind her and P.W. 1 also reached there. He saw that the accused namely Mata Prasad armed with pharsa, accused Bhurey @ Dinesh Kumar armed with ballam and rest of the accused armed with lathi were assaulting the deceased. On being confronted by the witnesses, the accused ran away. The deceased had sustained several injuries. The deceased was standing but accused hushed him down the ground and kept on assaulting. They were assaulting in the midst of the galiyara existing in between the houses of Chhotkau Kurmi and Koiley Pasi. The deceased was lifted from there and brought in front of the house of the Mohan Thekedar and Kailash Pradhan under the Pakaria tree and he was got laid down there. The deceased was alive for 5-10 minutes and thereafter he died. The P.W. 2 got the tahrir written through Indrajeet and went to the police station with Hansram brother of Chaukidar.

18. In his cross-examination, the P.W. 3 has stated his house is situated 15 paces away from the house of the deceased. P.W. 1 and 3 were present there and other villagers arrived after the incident. The appellant Bhurey @ Dinesh Kumar was assaulting the deceased with the ballam from the wooden side and he was not piercing. The appellant Mata Prasad was assaulting with pharsa from the side of edges. There was civil litigation between father of this witness and other villagers. He expressed his unawareness as to whether the appellant Mata Prasad was a witness in the criminal case initiated against his father or not.

19. P.W. 4 in his examination-in-chief has stated that on 23.9.1998 he was posted as S.O. Ikauna. One Onkar Nath Pathak was Head moharrir posted there. The F.I.R. was written by him and the case was entered in the G.D. at report no. 32 at 10.00 p.m. in the night. He proved the chik report and tahrir as Ext. ka-1 and Ext ka-2. He assumed the investigation of this case. On 23.9.1998, he entered the copy of chik and G.D. in his case diary and recorded the statement of the head moharrir Onkar Nath Pathak. Thereafter, he reached the village of the deceased with his subordinates namely Constable Dinesh Tiwari and Subhash Chandra Yadav(P.W. 5) who were on patrol duty and were summoned. The dead body of the deceased was lying in front of the house of Mohan Verma. He recorded the statement of the complainant and other witnesses in the night. In the morning on the pointing out of the complainant P.W. 4 inspected the spot and prepared the site plan. He proved the site

plan as exhibit Ka -4. He took the blood stained soil and simple soil from the place where the deceased had been assaulted and sustained injuries. He prepared the memo of blood stained and simple soil. He proved the paper as exhibit Ka-5 and Ka-6. Thereafter, he prepared the inquest report on the deceased body of the deceased and proved it as exhibit Ka-7. He prepared the photo lash, challan-lash and letter for postmortem and proved these papers as Exhibits ka-8, ka-9 and ka-10. He prepared the sample seal and proved it as Exhibit Ka-11. He proved the letter to R.I. as Exhibit ka-12. He entered the inquest report and statement of witnesses in the case diary. On 26.9. 1998, postmortem report was received. He entered it in the case diary. On 9.10.1998, he recorded the statement of the accused and submitted the charge-sheet. He proved the charge-sheet as Exhibit ka-13.

20. In cross examination, the P.W. 4 has stated that the blood had fallen there but he did not take blood in his possession.

21. P.W. 5 in his examination-in-chief has deposed that on 24.9.1998 he was posted as Constable in police station Ikauna. In the intervening night of 23/24.9.1998. He along-with the constable Dinesh Tiwari who was on patrol duty was summoned by the P.W. 4. and they had gone to village of the deceased with the P.W. 4. On 24.9.1998, after preparation of inquest report the dead body in a sealed cover was handed over to this witness and other constables and they took the dead body to mortuary. The doctor got the identification of the dead body from this witness and Dinesh Tiwari- other Constable at the time of post mortem examination.

22. P.W. 6 in his examination-in-chief has stated that on 24.9.1998 he was posted on the post of Surgeon. He conducted the postmortem on the dead body of the deceased at 4.45 p.m. in the evening who was brought by Constable CP 58 Subhash Chandra Yadav and CP 116 Dinesh Tiwari in sealed condition with all the papers and identified the dead body of the deceased. He proved the antemortem injuries of the deceased described in the post-mortem report. He opined that the cause of death was shock and hemorrhage as a result of antemortem injuries which were sufficient to cause death. Deceased had died a day before. He proved the postmortem report as Exhibit Ka-14. He noted the following observations :-

Injury No. 3 and 7 were possible from the edges side of ballam.

Injuries No. 8, 9 and 10 were possible from the edges side of Pharsa.

Injuries no. 1, 2, 4 5, and 6 were possible by blunt weapon for example lathi. Injury no. 1 and 6 were possible by several blows.

23. In cross examination, P.W. 6 has deposed that there may be variation of 4-6 hours in the time of death. Injury no. 3, 7, 8 , 9 and 10 are on non-vital parts. Injury nos. 1 and 6 were possible by a blunt weapon for example some heavy stone or heavy iron. Injury no. 1 and 6 are single injury in itself. Injury nos. 3, 7, 8, 9 and 10 are simple in nature. Ballam is a pointed weapon. Except the fracture of bone on upper arm and metacorpal in injury no. 4 and 6, there was no other bone fracture. Liver had raptured due to injury no. 1 and except this injury fracture of bone was found in injury nos. 4 and 6. For causing death, injury no. 1 was primarily responsible. Pharsa is a heavy weapon and it is wrong to say that injury nos. 8, 9 and 10 were not possible through heavy weapon like pharsa.

**Analysis**

24. Upon hearing the arguments advanced by the learned counsel for the appellants and learned A.G.A. at length, we find that following points are involved for consideration in this appeal against the impugned judgment and order of conviction and sentence of the appellants.

**Point No. I**

**(I) Whether all the prosecution witnesses have supported the prosecution case.**

25. P.W. 2 who is daughter-in-law of the deceased has supported the prosecution case by stating that P.W. 1 and P.W. 3 who are independent witnesses in this case also reached at the place of occurrence. The statement of the P.W. 2 that the accused appellant Mata Prasad armed with ballam, appellant Bhurey @ Dinesh Kumar armed with pharsa and the appellants namely Pappu, Puttan and Daddan armed with lathi is corroborated with the statements of the P.W. 1 and P.W. 3.

26. P.W. 2 i.e. daughter-in-law of the deceased has stated that the deceased was assaulted by the accused appellants in the galiyara existing in between the house of Koiley Pasi and Chhotkau Kurma and the deceased was alive for some time after being assaulted by the accused appellants. This fact has also been reiterated by the P.W. 1 and P.W. 3 in the cross-examination. P.W. 2 has stated that the dead body of the deceased was brought by the P.W. 1 and 3 under the pakaria tree and was laid down and this pakaria tree exists in front of the houses of Mohan and Pradhan which is supported by the P.W. 1 and 3 in the statements. The fact that the P.W. 1 got a tahrir scribed through one Indrajit and went police station along-with Hansram brother of Chaukidar is also supported by the P.W. 1 and 3 in their statements.

27. P.W. 4 who is Investigating Officer in this case, in his examination-in-chief, has also supported the prosecution case by proving the chik report and tahrir as Ext. ka-1 and Ext ka-2 which were entered in his case diary. P.W. 4 has stated that on the date of incident he went to the village of the deceased with his subordinates namely Constable Dinesh Tiwari and Subhash Chandra Yadav(P.W. 5) who were on patrol duty and were summoned. P.W. 5 namely Subhash Chandra Yadav has also supported the version of P.W. 4 by stating that the on the date of incident he and the Constable Dinesh Tiwari were summoned to go to the village of the deceased Babhaniwan with the Investigating Officer i.e. P.W. 4. The statement of the P.W. 4 that the dead body of the deceased was lying in front of the house of Mohan Verma and that the statements of the complainant and other witnesses were recorded in the night and in the next morning on the pointing out of the complainant he inspected the spot and prepared the site plan was well supported by the P.W. 5.

28. P.W. 6 who conducted postmortem on the dead body of the deceased has stated that the dead body of the deceased was brought by the P.W. 5 i.e. Constable CP 58 Subhash Chandra Yadav and CP 116 Dinesh Tiwari in a sealed condition with all the papers and they had identified the dead body of the deceased. This statement also goes in line with the statement of the P.W. 5.

29. The presence of P.W. 2 along-with P.W. 1 and 2 at the spot at the time of

occurrence is proved beyond reasonable doubt from their statements recorded during examination-in-chief and cross examination as the statements of the said witnesses are well corroborated and there is no contradiction on any single point. As such, on the basis of factual aspect, it is proved that the P.W. 2 along-with P.W. 1 and P.W. 3 was present at the spot and they had seen the accused appellants assaulting the deceased. The statements of P.W. 4, 5 and 6 are also corroborated and they support the prosecution case. Statements of all the prosecution witness supports each other and there is no contradiction on any point, as such, the truthfulness of factual matrix cannot be doubted in the absence of any material evidence to the contrary.

30. Point No. I is decided accordingly.

**Point No. II**

**(II) Whether the previous enmity is strong motive to falsely implicate the appellants.**

31. The ground of previous enmity between the family of the accused and the deceased is also vehemently raised by learned counsel for the appellants.

32. P.W. 2 in the F.I.R. has alleged that prior to this incident a clash had taken place in which family members of the appellant were detained in jail and in vengeance thereof they assaulted the deceased on 23.9.1998 at about 5.30 p.m. The enmity between the appellants and family members of the deceased could not be refuted particularly in presence of two independent witnesses i.e. P.W. 1 and P.W. 3 who have supported the prosecution case and reiterated the same version as was stated by the P.W. 1.

33. As such, the ground of enmity which is proved beyond reasonable doubt, is a strong motive for the appellants to commit the offence.

34. Point No. II is decided accordingly.

Point No. III

(III) Whether the P.W. 1 and P.W. 3 are interested witnesses and their testimonies are reliable and trustworthy.

35. P.W. 2 is daughter-in-law of the deceased. P.W. 1 and P.W. 3 are stated to be present at the place of occurrence while the deceased was being assaulted by the accused appellants. The presence of the P.W. 1 and 2 at the spot at the time of occurrence is proved beyond reasonable doubt. The ground taken by the appellants is that the P.W. 1 and P.W. 3 are the interested witnesses of the incident. P.W. 1 in his cross-examination has stated that there is land dispute between the father of the P.W. 3 namely Nand Kumar and other villagers. In one criminal case instituted by a villager against the father of the P.W. 3, the accused Mata Prasad was the witness or not is not known to the P.W. 1. P.W. 3 has reiterated the same version in his statement. P.W. 1 has also admitted that there is previous enmity with the deceased and the appellants due to which the said incident occurred. There is no evidence on record on the basis of which it can be said that the P.W. 1 and P.W. 3 have previous enmity with the accused appellants. Thus, the ground of the P.W. 1 and P.W. 3 being interested witnesses does not stand to appeal.

36. Point No. III is decided accordingly.

**Point No. IV**

**(IV) Whether the F.I.R. was lodged with delay.**

37. Learned counsel for the appellants has further argued that the distance from the place of incident to the police station is only 12 k.m. but the F.I.R. was lodged after the delay of 4.30 hours.

38. P.W. 2 in his examination-in-chief has attempted to justify the delay by stating that the male members were detained in jail and there was no male member in his family due to which the delay in lodging the F.I.R. occurred. The P.W. 2 in her examination-in-chief has also stated that she got a tahrir scribed through one Indrajit and took it to police station with Hansram brother of Chaukidar. P.W. 1 and 3 have also stated that after getting the tahrir scribed through Indrajit and the P.W. 2 he had gone police station with Hansram brother of Chaukidar.

39. Keeping the aforesaid statement in view, the ground of delay in lodging the F.I.R. looses its strength and turned down.

40. Point No. IV is decided accordingly.

**Point No. V**

**(V) Whether the medical evidence corroborated with the ocular evidence.**

41. Now, analyzing the medical evidence, we find that the P.W. 6 conducted postmortem on the body of the deceased and opined that the cause of death was shock and hemorrhage as a result of antemortem injuries which were sufficient to cause death. He proved the postmortem report as Exhibit ka-14.

42. P.W. 6 has opined that injury No. 3 and 7 were possible from the edges side of ballam. Injuries No. 8, 9 and 10 were possible from the edges side of Pharsa. Injuries no. 1, 2, 4 5, and 6 were possible by blunt weapon for example lathi. Injury no. 1 and 6 were possible by several assault.

43. In cross examination, P.W. 6 has deposed that the injury no. 3, 7, 8 , 9 and 10 are on hand and leg which are non-vital parts. Injury nos. 1 and 6 were possible by a blunt weapon like some heavy stone or heavy iron. Injury no. 1 and 6 are single injury in itself. Injury nos. 3, 7, 8, 9 and 10 are simple in nature. Ballam is a pointed weapon. Except the fracture of bone on upper arm and metacorpal in injury no. 4 and 6, there was no other bone fracture. Liver had raptured due to injury no. 1 and except this injury fracture of bone was found in injury nos. 4 and 6. For causing death, injury no. 1 was primarily responsible. Pharsa is a heavy weapon and it is wrong to say that injury nos. 8, 9 and 10 were not possible through heavy weapon like pharsa.

44. P.W. 1, 2 and 3 have stated that the accused appellant Bhurey @ Dinesh Kumar was armed with ballam and P.W. 3 in his cross examination has stated that appellant Bhurey @ Dinesh Kumar was assaulting the deceased with ballam. P.W. 1, 2 and 3 all have stated the accused appellant Mata Prasad to be armed with pharsa. P.W. 1, 2 and 3 all have stated the accused appellants namely Pappu, Puttan and Daddan to be armed with lathi.

45. Antemortem injuries found on the dead body of the deceased indicate that they were caused by the pharsa, ballam and lathi. As such, the medical evidence corroborates with the ocular evidence.

46. Point No V is decided accordingly.

**Point No. VI**

**(VI) Whether the death of the deceased is culpable homicide not amounting to murder in view of provisions of exceptions if any to Section 300 I.P.C. and is punishable under Section 304 read-with Section 149 I.P.C.**

47. The deceased sustained total ten injuries as per the postmortem report. In the medical opinion of the doctor who conducted the postmortem stated that the cause of death of the deceased was antemortem injuries caused by due to shock and hemorrhage.

48. P.W. 6 in examination-in-chief has stated that the injury no. 1 is the main cause of death. The injury no. 1 has been caused with blunt object like lathi by severe assault. P.W. 6 in his cross examination has stated that the injury no. 1 has been caused with heavy stone or heavy iron rod and the said injury is single in itself. It is not clear from the statement of the P.W. 6 that whether the injury no. 1 is itself a single injury or was caused by several blows. The appellants Mata Prasad and Bhurey @ Dinesh Kumar who were armed with pharsa and ballam have died during pendency of this appeal. The remaining appellants were assigned the role of lathi. It is to be noted that the weapons used by the present appellants in committing the crime were not deadly weapons. It will also be necessary to take into consideration the background in which the offence took place. There was an old enmity between the deceased and the appellants. If there was any mens rea of killing the deceased the accused appellants Mata Prasad and Bhurey @ Dinesh Kumar were armed with pharsa and ballam and they may cause death of the deceased by piercing the said arms in the body of the deceased. The P.W. 3 in his cross-examination has stated that the appellant Bhurey @ Dinesh Kumar was assaulting the deceased with the wooden side of ballam. The surviving appellants were armed with lathi and the intention of the appellants was not to cause death of the deceased. The deceased died due to shock and hemorrhage and injuries on liver which must be caused by pharsa or ballam. The present appellants were having lathi as a weapon. Accused Mata Prasad and Bhurey @ Dinesh Kumar were having such deadly weapons which shows their intention to kill the deceased and not the present appellants. The presents appellants only wanted to cause bodily injuries to the deceased and they were not having any intention to kill the deceased. The injury no. 1 was main responsible to cause death of the deceased and the said injury was sustained on the abdominal part of the deceased and this injury may only be caused by a single assault. Injury nos. 3, 7, 8, 9 and 10 are also stated to be caused on non-vital parts. The said injuries also indicate that the appellants caused injuries to the deceased without intention to kill him. Moreover, the accused appellants belong to same family and accused Mata Prasad and his son Bhurey @ Dinesh Kumar who were armed with pharsa and ballam have died during pendecy of the appeal and the appeal in respect of them has abated and now the appeal survives on behalf of the appellants who are stated to be armed with lathi.

49. Considering the evidence of the witnesses and also considering the medical

evidence including postmortem report, there is no doubt left in our mind about the guilt of the appellants. However, the question which falls for our consideration is whether, on appreciation of the peculiar facts and circumstances of the case, the conviction of the appellant deserves to be converted under Section 304 Part I or part II of the I.P.C.

50. The academic distinction between 'murder' and culpable homicide not amounting to murder has always vexed the Courts. The confusion is caused, if Courts losing sight of the true scope and meaning of the term used by the legislature in these Sections, allow themselves to be drawn into minute abstractions.

51. On overall scrutiny of the facts and circumstances of the present case coupled with the opinion of the Medical Officer and the principle laid down by the Apex Court in the catena of judgments, we are of the considered opinion that offence would be punishable under Section 304 Part I of the I.P.C.

52. Point No. VI is decided accordingly.

53. In view of the discussions made above, we are of the considered view that the impugned judgment and order is liable to be confirmed insofar as conviction and sentence under Section 147 I.P.C. is concerned. However, insofar as the conviction and sentence under Section 302 read-with Section 149 I.P.C. is concerned instead of holding accused appellants guilty of offence punishable under Section 302 read-with Section 149 I.P.C., they are held guilty of offence under Section 304 Part I read with Section 149 I.P.C. The conviction is liable to be altered and modified and the appeal is liable to be allowed partly.

54. Accordingly, the appeal filed by the appellants is **partly allowed**. The conviction and sentence of appellants under Section 147 is affirmed and their conviction under Section 302 read-with Section 149 I.P.C. is modified as above and the accused appellants are convicted for offence punishable under Section 304 part I I.P.C. read-with Section 149 I.P.C. Therefore while modifying the sentence of life imprisonment under Section 302/149 I.P.C., both the appellants are sentenced to 10 years rigorous imprisonment and Rs. 5000/- fine and in case of default of payment of fine within two months to undergo simple imprisonment for an additional period of two months. All the sentences shall run concurrently. The period of sentence already undergone by them shall be adjusted in the sentence awarded by this Court.

55. During the course of trial, the appellants are on bail. Their personal bonds and surety bonds are cancelled and sureties discharged. The accused appellants namely Pappu, Puttan and Daddan are directed to surrender before the trial court forthwith to serve out the remaining term of sentence and deposit the fine imposed. If they fail to surrender as directed, the trial court shall take necessary action against the appellants for ascertaining compliance of the order of conviction and sentence.

56. Let the trial court record be transmitted to the trial court forthwith along-with a copy of judgment, with a direction that it shall take immediate steps for arrest of appellants for serving the remaining term of sentence.

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**(2024) 11 ILRA 527**
**ORIGINAL JURISDICTION**
**CRIMINAL SIDE**
**DATED: LUCKNOW 26.11.2024**

**BEFORE**

**THE HON'BLE RAJEEV SINGH, J.**

Application U/S 482 No. 10390 of 2024

**Prateek Agarwal ...Applicant**
**Versus**
**State of U.P. & Anr. ...Opposite Parties**

**Counsel for the Applicant:**
Ayush Singh, Rudra Pratap Singh, Sushil Kumar Singh

**Counsel for the Opposite Parties:**
G.A.

**Criminal Law – Criminal Procedure Code, 1973 – Sections 161, 164, 209-A & 482 - The Indian Penal Code, 1860 - Sections 302 & 328 - Bharatiya Nagarik Suraksha Sanhita, 2023 – Sections 210 & 223(1)** - Application u/s 482 – for quashing entire criminal proceedings - FIR – offence of murder – police filed final report – complainant filed protest petition – which was treated as complaint case – issue notices – examination of complainant – court finds that, trial court issue notices without recording the St.ment of complainant as well as witnesses - held, in light of judgment and order passed in case of Sri Basangouda R. Patil Vs Sri Shivananda S. Patil – impugned order is in violation of the provision of Section 223 of BNSS – hence, application is allowed – matter is remitted back to the learned Magistrate to pass fresh order after recording the St.ment of the complainant as well as witnesses. (Para – 6, 9, 10, 11)

**Application Allowed.** (E-11)

**List of Cases cited:**

Shri Basanagouda R. Patil Vs Shri Shivananda S. Patil – Criminal Petition No. 7526/2024 Dated 27.09.2024 passed by Hon'ble High Court of Karnataka.

(Delivered by Hon'ble Rajeev Singh, J.)

1. Heard Sri Sushil Kumar Singh, learned counsel for the applicant and Sri Alok Kumar Tiwari, learned A.G.A. for the State.

2. The present application under Section 482 Cr.P.C. is filed with the prayer to quash the impugned order dated 8.11.2024 passed by the Sessions Judge, Sitapur, in Criminal Revision No.Nil/2024 (C.I.S.S. No.187/2024, Case Crime No.460/2023, under Sections 302, 328 I.P.C., Police Station Kotwali, District Sitapur) as well as the order dated 15.10.2024, passed by the Chief Judicial Magistrate, Sitapur.

3. With the consent of learned A.G.A., present application under Section 482 Cr.P.C. is being decided finally.

4. Learned counsel for the applicant submits that the applicant was falsely implicated in the present case, as no evidence was found after detail investigation final report was submitted by the Investigating Officer. He further submits that protest petition was filed by the complainant of the present case, which was treated as a complaint case by the learned trial court on 15.10.2024 under Section 210 of B.N.S.S., 2023 and notice was issued to the accused person/applicant under the provisions of proviso (1) of Section 223 of B.N.S.S.

Learned counsel for the applicant submits that prior to the issuance of notice to the accused/applicant, it was obligatory on the part of the learned court below to

record the statement of the complainant as well as witnesses and thereafter, copy of the complaint as well as statement of complainant and other witnesses taken on oath were to be provided to the accused annexing the notice, but in the present case, statement was not recorded, and therefore, impugned order is bad in the eyes of law. Relying on the decision of Karnataka High Court passed in ***Criminal Petition No.7526 of 2024 (Sri Basanagouda R. Patil Vs. Sri Shivananda S. Patil)*** learned counsel for the applicant requests for kind indulgence of this Court.

5. Learned A.G.A. opposes the prayer of the applicant and submits that statement can be recorded after appearance of the accused/applicant however, he does not dispute the intentions of the Section 223 of B.N.S.S. as well as the legal pronouncement of the High Court of Karnataka in the aforesaid case.

6. Considering the arguments of learned counsel for the parties, going through the record of the application as well as other relevant documents, it is evident that a protest petition was filed by the complainant of the present case, which was treated as a complaint case by the trial court on 15.10.2024 under Section 210 of B.N.S.S., 2023. It is also evident that at the moment, the complaint was registered, the trial court, before recording the statement of complainant as well as witnesses, issued notice to the accused/applicant, which is erroneous.

7. Section 223 of B.N.S.S. reads as under :-

*"223. Examination of complainant. - (1) A Magistrate having jurisdiction while taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate:*

*Provided that no cognizance of an offence shall be taken by the Magistrate without giving the accused an opportunity of being heard:*

*Provided further that when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses –*

*(a) if a public servant acting or purporting to act in the discharge of his official duties or a Court has made the complaint; or*

*(b) if the Magistrate makes over the case for inquiry or trial to another Magistrate under section 212:*

*Provided also that if the Magistrate makes over the case to another Magistrate under section 212 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them:*

*(2) A Magistrate shall not take cognizance on a complaint against a public servant for any offence alleged to have been committed in course of the discharge of his official functions or duties unless –*

*(a) such public servant is given an opportunity to make assertions as to the situation that led to the incident so alleged; and*

*(b) a report containing facts and circumstances of the incident from the officer superior to such public servant is received."*

8. Proviso of Sub Section (1) of Section 223 of the B.N.S.S. mandates that a Magistrate while taking cognizance of an offence, on a complaint, shall examine

upon oath, the complainant and the witnesses present, if any, and reduce it into writing. The Proviso further mandates that no cognizance of an offence shall be taken by the Magistrate without giving an opportunity to the accused of being heard. Section 227 of the B.N.S.S. deals with the issuance of process which is akin to Section 204 of the Cr.P.C.

9. Relevant part of the order dated 27.9.2024 passed in ***Criminal Petition No.7526 of 2024 (Sri Basanagouda R. Patil Vs. Sri Shivananda S. Patil)*** passed by High Court of Karnataka is as under:-

*"8. The obfuscation generated in the case at hand is with regard to interpretation of Section 223 of the BNSS, as to whether on presentation of the complaint, notice should be issued to the accused, without recording sworn statement of the complainant, or notice should be issued to the accused after recording the sworn statement, as the mandate of the statute is, while taking cognizance of an offence the complainant shall be examined on oath. The proviso mandates that no cognizance of an offence shall be taken by the Magistrate without giving the accused an opportunity of being heard.*

*9. To steer clear the obfuscation, it is necessary to notice the language deployed therein. The Magistrate while taking cognizance of an offence should have with him the statement on oath of the complainant and if any witnesses are present, their statements. The taking of cognizance under Section 223 of the BNSS would come after the recording of the sworn statement, at that juncture a notice is required to be sent to the accused, as the proviso mandates grant of an opportunity of being heard.*

*10. Therefore, the procedural drill would be this way:*

*A complaint is presented before the Magistrate under Section 223 of the BNSS; on presentation of the complaint, it would be the duty of the Magistrate / concerned Court to examine the complainant on oath, which would be his sworn statement and examine the witnesses present if any, and the substance of such examination should be reduced into writing. The question of taking of cognizance would not arise at this juncture. The magistrate has to, in terms of the proviso, issue a notice to the accused who is given an opportunity of being heard. Therefore, notice shall be issued to the accused at that stage and after hearing the accused, take cognizance and regulate its procedure thereafter.*

*11. The proviso indicates that an accused should have an opportunity of being heard. Opportunity of being heard would not mean an empty formality. Therefore, the notice that is sent to the accused in terms of proviso to sub-section (1) of Section 223 of the BNSS shall append to it the complaint; the sworn statement; statement of witnesses if any, for the accused to appear and submit his case before taking of cognizance. In the considered view of this Court, it is the clear purport of Section 223 of BNSS 2023.*

*12. Swinging back to the facts of the case the concerned Court has passed the following order:*

*"This complaint is filed against the Accussed alleging the offence P/U/Sec.356(2) of BNS, 2023.*

*Issue notice to the Accused as per proviso to section 223 of BNSS, 2023.*

*For hearing.*

*Call on 13.08.2024."*

*The moment complaint is filed, notice is issued to the accused. This*

*procedure is erroneous. Therefore, the petition deserves to succeed on this short ground of procedural aberration and the matter is to be remitted back to the hands of the concerned Court to redo the exercise from the beginning, bearing in mind the observations made in the course of the order.*

*13. For the aforesaid reasons the following:*

*ORDER*

*(i) Criminal Petition is allowed.*

*(ii) Impugned order dated 16-07-2024 passed by the XLII Additional Chief Judicial Magistrate, Bengaluru in PCR No.9136 of 2024 stands quashed.*

*(iii) Matter is remitted back to the learned Magistrate to redo the exercise afresh, from the stage of entertainment of the complaint, bearing in mind the observations made in the course of the order.*

*(iv) The said exercise shall be undertaken within 4 weeks from the date of receipt of the copy of this order.*

*Consequently, I.A.No.2 of 2024 stands disposed."*

10. In view of the above facts and discussions, present application is **allowed.** The impugned order dated 15.10.2024 is in violation of the provision of Section 223 of B.N.S.S., and therefore, the same is hereby set aside.

11. The Chief Judicial Magistrate, Sitapur is directed to pass fresh order after recording the statement of the complainant as well as witnesses of the present case.

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**(2024) 11 ILRA 530**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 12.11.2024**

**BEFORE**

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

Matters Under Article 227 No. 9750 of 2023
(Criminal)

**Babbar @ Pabbar & Ors. ...Petitioners**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioners:**
Sri Romeshwari Prasad

**Counsel for the Respondents:**
G.A., Sri Vinay Kumar Pandey, Sri Himanshu Srivastava

**Civil Law – Constitution of India,1950 – Article 227 – Criminal Procedure Code,1973 - Sections – 145 & 146:** - Misc. Petition – challenge to the impugned order – petitioner in peaceful possession over the land in question for 40-50 years – respondent no. 4 initiates proceedings u/s 145/146 Cr.P.C. for forcible possession – objection raised, citing pending civil suit – no likelihood of breach of peace – impugned proceedings alleged as an attempt to harass the petitioner – SDM directs attachment and custody takeover – Criminal Revision – dismissed – Misc. Petition – court observes – respondent no. 4 not impleaded as a defendant in civil suit – no ad-interim injunction in petitioner's favour – held, relying on case law of Hon'ble Supreme Court in Amresh Tiwari's case, no illegality in impugned order – petition dismissed. (Para – 7, 8, 9)

**Misc. Petition Dismissed.** (E-11)

**List of Cases cited:**

Amresh Tiwari Vs Lalta Prasad Dubey & anr. (2000 vol. 4 SCC 440).

(Delivered by Hon'ble Ms. Nand Prabha Shukla, J.)

1. Heard Sri Romeshwari Prasad, learned counsel for the petitioners, Sri

Himanshu Srivastava, holding brief of Sri Vinay Kumar Pandey, learned counsel for the respondents, Sri Rajesh Kumar Gupta, learned A.G.A. for the State and perused the record.

2. By means of this petition under Article 227 of the Constitution of India, the petitioners have prayed to set aside the impugned orders dated 18.08.2023 passed by learned Additional Session Judge, Court No. 1, Varanasi in Criminal Revision No. 102 of 2021 Babbar @ Pabbar and others Vs. State of U.P. and others and order dated 27.02.2021 passed by learned Sub-Divisional Magistrate, Sadar, Varanasi in Case No. 15142 of 2020, under Section 145 Cr.P.C., P.S.-Maduadih, District-Varanasi, Ravindra Sonker Vs. Babbar and further not to interfere in the peaceful possession of the petitioners' property during the pendency of this present writ petition.

3. The main submission of learned counsel for the petitioners is that the petitioners are in the peaceful possession of Arazi No. 223/1 admeasuring 2720 square ft. land for the last 45-50 years. By initiating the proceedings under Section 145/146 Cr.P.C. before the Sub-Divisional Officer, Sadar, Varanasi, the respondents are trying to take illegal and forceful possession of his property. It has also been submitted that a civil suit is already pending between the parties before the Competent Court of law, therefore, there was no occasion to institute a parallel proceeding under Sections 145 and 146 Cr.P.C. There was no likelihood of the breach of peace and the instant proceedings have been endeavoured to harass the petitioners under the garb of Section 145 Cr.P.C. in order to settle their personal score.

4. Per contra, learned counsel for the respondent Nos. 4 and 5 have controverted the aforesaid contention and have asserted that they are the owners of the disputed land as the sale deed dated 24.09.2018 was executed in favour of respondent No. 4.

5. Upon hearing learned counsel for the parties and from the perusal of record, it transpires that the said property belongs to Bhudaan Yagna Samiti and was donated to Shri Laxamdas and after the death of Shri Laxamdas, his son Shri Kalidas inherited the property. Kalidas permitted the petitioners to enjoy the property after taking some consideration. Kalidas had two sons, namely, Ishwarchand Vidyasagar and Anand Sagar. After the death of Kalidas, two sons of Champa Devi tried to take illegal possession. Ishwar filed a suit against Champa Devi and her sons, however, it was dismissed. After the death of Ishwar, his brother Anand Sagar in connivance with Champa Devi tried to evict the petitioners. The petitioners then filed a Civil Suit bearing No. 239 of 2012 for declaration of ownership and injunction which is still pending. It also transpired that in 2003, Kalidas executed a sale deed to Champa Devi pertaining to the land Arazi No. 223/1, total area 2720 square ft. situated in the Village Shivdaspur, Police Station-Maduadih, District-Varanasi. Subsequently, Champa Devi executed Satta to Ravindra Sonker and Ashish Sonker. After the death of Champa Devi, her sons Heera Lal and others executed a registered sale deed of 544 square ft. from the said arazi on 15.09.2018. Her son Pyare Lal executed a registered sale deed of his share. After that on 24.09.2018, Heera Lal, Nand Lal, Santosh and Chotey Lal, son of late Shiv Ram executed a sale deed to Ravindra Sonker and his name was entered in the revenue record. The petitioners who are in possession tried to raise construction on the said land due to which there was likelihood

of breach of peace and the proceeding under Section 145 Cr.P.C. was initiated by Ravindra Sonker respondent No. 4.

6. On the basis of a Police Report dated 12.11.2020, the Sub-Divisional Officer, Sadar, Varanasi vide order dated 24.11.2020 had passed a preliminary order under Section 145 Cr.P.C. directing both the parties to claim their rights. After having satisfied that there was all likelihood of breach of peace as the purchaser tried to take possession over the disputed plot while the petitioners who were already in possession raised objection, accordingly, the disputed property was attached vide order dated 27.02.2021 and the Station House Officer, Maduadih, Varanasi was directed to either take over the custody himself or give to some other impartial person and the parties were directed to produce oral and documentary evidence claiming their title.

7. Being aggrieved by the order of attachment dated 27.02.2021, the petitioners filed a Criminal Revision No. 102 of 2021 before the Additional Sessions Judge, Court No. 1, Varanasi. However, the said Criminal Revision was dismissed and the order dated 27.02.2021 passed by the Sub-Divisional Officer, Sadar, Varanasi was affirmed on the ground that respondent No. 4 Ravindra Sonker was not made a defendant in the Civil Suit No. 239 of 2012 pending before the Court of Civil Judge (Junior Division), Varanasi Babbar Vs. Anand in which the main dispute was with regard to the possession of the disputed land between Ravindra Sonker and the petitioners. It is also apparent that no any ad-interim injunction has been granted in favour of the petitioners in the said suit. The police report dated 12.11.2020 also reveals that there was every chance of breach of peace.

8. The Hon'ble Apex Court in the case of **Amresh Tiwari Vs. Lalta Prasad Dubey and Anr. 2000 4 SCC 440** has held that *"We clarify that we are not stating that in every case where a civil suit is filed, Section 145 proceedings would never lie. It is only in cases where civil suit is for possession or for declaration of title in respect of the same property and where reliefs regarding protection of the property concerned can be applied for and granted by the civil court then proceedings under Section 145 should not be allowed to continue. This is because the civil court is competent to decide the question of title as well as possession between the parties and the orders of the civil court would be binding on the Magistrate."*

9. In the matter in hand, through the civil suit is pending, but no protection or ad interim injunction has been granted, therefore, considering the aforesaid facts and circumstances, the submissions advanced above and the case law referred, there is no illegality in the order impugned. No interference is required.

10. Hence, the petition is **dismissed.**

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**(2024) 11 ILRA 532**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 21.11.2024**

**BEFORE**

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

Matters Under Article 227 No. 9914 of 2023

**Lakshmi Narayan & Ors. ...Petitioners**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioners:**
Ashutosh Mishra

**Counsel for the Respondents:**
G.A., Kashif Gilani, Rakesh Kumar Mishra

**Civil Law – Constitution of India,1950 – Article 227 - Criminal Procedure Code,1973 - Sections 145 & 146: -** Misc. Petition – Challenge to the Impugned order – Plot in question belongs to the petitioners, whose name was recorded in CH 45 during consolidation proceedings, and whom have residing there after constructing a two-story house - Respondent No. 6, claiming co-sharership over the house, initiated proceedings under Section 145 Cr.P.C. on the grounds of apprehension of breach of peace - Police report, submitted – objection raised – spot inspection, conducted by Naib Tehsildar and area Lekhpal – SDM ordered to drop the proceedings u/s 145 Cr.P.C., based on the report of the Naib Tehsildar - respondents No. 5 to 7 filed Criminal Revision – remand order for fresh consideration - Misc. Petition – Court observations – Spot inspection report shows that petitioners are in possession of the disputed plot and the house constructed upon it and during proceedings u/s 145 Cr.P.C., respondents No. 5 to 7 also instituted an Original Suit wherein notices were issued - Held: Considering the Naib Tehsildar's report, it is fairly concluded that petitioners are in peaceful possession of the plot and the two-story house, and there exists no apprehension of breach of peace – hence, impugned order is set aside, reaffirming the order of the SDM - Writ petition allowed accordingly. (Para – 11, 12, 15, 16)

**Misc. Petition Allowed.** (E-11)

**List of Cases cited:**

Amresh Tiwari Vs Lalta Prasad Dubey & anr. (2000 vol. 4 SCC 440).

(Delivered by Hon'ble Ms. Nand Prabha Shukla, J.)

1. Heard Sri Ashutosh Mishra, learned counsel for the petitioners, Sri Rajiv Kumar, Advocate holding brief of Sri Kashif Gilani, learned counsel for the respondent Nos. 5 and 7, Sri Rakesh Kumar Mishra, learned counsel for the respondent No. 6, Sri Suraj Singh, learned A.G.A. for the State of U.P. and perused the record.

2. The present writ petition under Article 227 of the Constitution of India has been filed with a prayer to set-aside the order dated 28.08.2023 (Anneuxre-1) passed by learned Additional Sessions Judge-I, Court No.1, Jaunpur in Criminal Revision No.167 of 2023 (Rajkumar and others vs. State of U.P. and others), arising out of Case No.4287 of 2022 under Section 145 Cr.P.C. during the pendency of this present petition.

3. Briefly, the dispute pertains to Plot No. 287 Ka situated at Village Belwa, Tehsil Mariahu, District-Jaunpur, which belongs to the petitioner No.1 Laxmi Narayan whose name was recorded in the CH Form 45 during the consolidation proceedings. The petitioner has been residing over the said plot after constructing a two storey house using the second floor for residential purpose and the first floor with a godown for running the shop.

4. On 08.05.2022, the respondent No. 6 Durga Prasad moved an application under Section 145 Cr.P.C. before the Sub-Divisional Magistrate, Tehsil Mariahu, District-Jaunpur alleging that there is apprehension of breach of peace as he owns a share in Plot No. 287 Ka and the petitioners were illegally occupying the said plot and the house constructed over it whereas the respondent Nos. 5 to 7 together owned half share in the said house.

5. Accordingly, a Police Report dated 21.05.2022 was sought from the concerned

Police Station. According to the said report, the ground floor was occupied by the petitioners whereas the second floor was occupied by respondent Nos. 5 to 7. However, the respondent Nos. 5 to 7 have constructed a separate house and were residing there.

6. Accordingly, the Sub-Divisional Magistrate, Tehsil Mariahu, District-Jaunpur passed a preliminary order dated 01.06.2022 under Section 145(1) Cr.P.C. holding that there was apprehension of breach of peace over the disputed property and directed the parties to appear with their records claiming their title. After having gone through the reply and the objections raised by the parties, the Sub-Divisional Magistrate, concerned vide order dated 10.04.2023 directed the Naib Tehsildar concerned to submit a report after making a spot inspection. The Naib Tehsildar concerned alongwith the Lekhpal concerned submitted its report dated 13.04.2023 stating that the petitioners are in possession of the plot in dispute and currently residing with their family on the second floor of the house and running the shop on the first floor having a godown as well. The said report also stated that there was no apprehension of breach of peace over the said plot and Durga Prasad had no possession on that house.

7. Accordingly, the Sub Division Magistrate, Tehsil Mariahu, District-Jaunpur vide order dated 15.04.2023 had recalled the order dated 01.06.2022 and dropped the proceedings under Section 145 Cr.P.C. on the ground that as per the report of Naib Tehsildar concerned, the petitioners are in possession of the house constructed over Plot No. 287 Ka and there was no apprehension of breach of peace.

8. Aggrieved by the said order, the respondent Nos. 5 to 7 preferred a Criminal Revision No. 167 of 2023 challenging the order dated 15.04.2023 before the learned Additional Sessions Judge-I, Jaunpur. Accordingly, vide order dated 28.08.2023 the Revisional Court had set aside the order dated 15.04.2023 and remanded the matter to the Sub Divisional Magistrate, Tehsil Mariahu, District-Jaunpur for fresh consideration in respect to their possession alongwith the relevant records.

9. Learned counsel for the petitioners contended that the impugned order dated 28.08.2023 is highly illegal and arbitrary as there was no apprehension of breach of peace. It has also been contended that the learned Revisional Court did not consider the fact that the petitioners are the owners of the disputed plot and the house constructed over it and their names were already existed in CH Form 45 vide order dated 07.09.1972 under Section 9A(2) of the U.P. Consolidation of Holding Act. The said order was never challenged during the consolidation proceedings. Once the consolidation proceedings came to an end and notification under Section 52 of the Consolidation of Holding Act, was issued, the said entry in the name of Petitioner No.1 became final. In order to circumvent the consolidation process, the respondents had initiated the proceedings under Section 145 Cr.P.C. As per section 49 of the U.P. Consolidation of the Holding Act, there is a bar on any civil or revenue proceedings. Even the report of the Naib Tehsildar concenred shows that on both the floors of the house situated over Plot No.287 Ka, the petitioner No.1 Lakshmi Narayan is having the possession. It has been further emphasised that the parties are closely related to each other as the father of the respondent Nos. 5 to 7 was the brother of

the petitioner No. 1 and could seek the remedy by instituting a suit for the partition of their share. The Police in its report dated 21.05.2022 has acted in bias by stating that the private respondents are residing in one of the floor. After the compromise, the respondents have settled separately.

10. Per contra, learned counsel for the respondent Nos. 4 to 7 have asserted that they reside on the first floor of the constructed house over the disputed plot and own half of the share over the disputed property.

11. Thus, from the perusal of the records, it transpires that impugned proceedings under section 145 Cr.P.C. have been initiated by the respondents on the basis of biased Police Report dated 21.05.2022. The spot inspection report dated 13.04.2022 of the Naib Tehsildar concerned and the Lekhpal concerned shows that the petitioners are in possession over the disputed plot as well as the house constructed over it. The preliminary order dated 01.06.2022 passed by the Sub Divisional Magistrate Tehsil Mariahu, District-Jaunpur under Section 145(1) Cr.P.C., was passed without application of mind.

12. During the course of arguments, it has been informed by the learned counsel for the petitioners that after the proceedings under Section 145 Cr.P.C. was initiated by the respondent Nos. 5 to 7, they instituted an Original Suit No. 1262 of 2023 on 15.09.2023 before the Civil Judge (Junior Division), Jaunpur seeking permanent injunction against the petitioners on the ground that the property in dispute is the property of their grandfather and half of its share belongs to the respondent Nos. 5 to 7.

13. Vide order dated 18.09.2023, the Civil Judge (Junior Division), Jaunpur has passed the following order on the Application 6C moved by the respondents:

*"प्रार्थना पत्र 6ग मय शपथ पत्र 7ग पर वादी के विद्वान अधिवक्ता को एकपक्षीय रूप से सुना एवं पत्रावली का अवलोकन किया।*

*प्रस्तुत प्रकरण आबादी/भवन निजाई के शाश्वत व्यादेश के अनुतोष हेतु दाखिल किया गया है तथा प्रार्थनापत्र 6ग के माध्यम से प्रश्नगत आबादी पर अन्तरिम व्यादेश का अनुतोष चाहा गया है। वादी की ओर से स्वत्व एवं अध्यासन के सम्बन्ध में कोई अभिलेख दाखिल नहीं किया गया है और न ही मौके की अवस्थिति के सम्बन्ध में कोई प्रपत्र दाखिल नही किया गया है। अतः बिना विपक्षी को सुने एवं बिना मौके की आख्या आये प्रथम दृष्टया एक पक्षीय अन्तरिम व्यादेश जारी किये जाने का आधार पर्याप्त नही है। अतः विपक्षी को वास्ते आपत्ति निस्तारण 6ग दिनांक 17.10.2023 नियत कर नोटिस जारी हो। पैरवी उभयप्रकार से अन्दर सप्ताह हो।"*

14. In support of his contention learned counsel for the petitioners has relied upon the judgment of the Hon'ble Supreme Court in **Amresh Tiwari vs. Lalta Prasad Dubey and another, (2002) 4 SCC 440**, wherein the Apex Court held that:

*" The SDM was right in discontinuing the proceedings under Section 145. It is not in every case where a civil suit is filed. Section 145 proceedings would never lie. It is only in cases where civil suit is for possession or for declaration of title in respect of the same property and where reliefs regarding protection of the property concerned can be applied for and granted by the civil court that proceedings under section 145 should not be allowed to continue. This is because the civil court is competent to decide the question of title as well as possession between the parties and the*

*orders of the civil court would be binding on the Magistrate."*

15. Thus, considering the report of the Naib Tehsildar concerned and the Lekhpal concerned dated 13.04.2023 regarding the possession of the petitioners and the entry in CH Form 45 vide order dated 07.09.1972, it can be fairly concluded that the petitioners are in peaceful possession of Plot No. 287 Ka and the two story house constructed over it and there is no apprehension of the breach of peace. The Original Suit No. 1262 of 2023 filed by the respondents is pending decision between the parties.

16. After analysing the aforesaid facts and circumstances and the submissions advanced by the parties, the order dated 28.08.2023 (Anneuxre-1) passed by the learned Additional Sessions Judge-I, Court No.1, Jaunpur in Criminal Revision No.167 of 2023 (Rajkumar and others vs. State of U.P. and others), arising out of Case No.4287 of 2022, under Section 145 Cr.P.C. is hereby set-aside, affirming the order dated 15.04.2023 passed by the Sub Divisional Magistrate, Tehsil Mariahu, District-Jaunpur.

Accordingly, the writ petition is **allowed.**

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**(2024) 11 ILRA 536**
**APPELLATE JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 27.11.2024**

**BEFORE**

**THE HON'BLE KRISHAN PAHAL, J.**

Criminal Misc. Bail Cancellation Application No. 532 of 2023

**Vinod Singh ...Applicant**

**Versus**

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

**Counsel for the Applicant:**
Chandrika Patel, Gunjan Jadwani

**Counsel for the Opposite Parties:**
G.A., Shubham Kesarwani

**(A) Criminal Law - Criminal Procedure Code, 1973 - Section – 438 (1)(ii) - Indian Penal Code, Sections – 420, 467, 468, 471, 386, 397, 115, 323, 504 & 506 -** Bail Cancellation Application – order of trial court granting Anticipatory Bail – by allowing second Anticipatory Bail Application – wherein the accused/opposite party no. 2 has not approached the court below with clean hand – Court finds that, - opposite party no. 2 has criminal antecedents and that too has not explained, as such, the order granting anticipatory bail to the applicant cannot be sustained and him being a practicing advocate makes his case worse –held, the court seeks to strike a delicate balance between safeguarding individual liberty and upholding the interest of justice and public safety - hence, he impugned order is not sustainable and is liable to be set aside – accordingly, instant bail cancellation application is allowed – direction issued to opposite party no. 2 to surrender before the trial court with liberty to avail the remedy for regular bail. (Para - 18, 23, 24)

**Application allowed.** (E-11)

**List of Cases cited:**

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

2. Dolat Ram & ors. Vs St. of Har.– (1995) I SCC 349,

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

4. Mahipal Vs Rajesh Kumar @ Polia & anr. - AIR 2020 SC 670,

5. Colby Furniture Company, Inc. Vs Belinda J. Overton – 299 So. 3D 259,

6. Holy Family Catholic School Vs Boley – 847 So. 2D 371 (2002),

7. Ash Mohammad Vs Shiv Raj Singh – (2012) 9 SCC 446,

8. Brij Nandan Jaiswal Vs Munna Jaiswal – AIR 2009 SC 1021,

9. Anil Kumar Tulsiyani Vs St. of U.P. – 2006 (55) ACC 1014 (SC),

10. Sompal Singh Vs Sunil Rathi – 2005 (1) SCJ 107,

11. St. of U.P. Vs Amarmani Tripathi – (2005) 8 SCC 21,

12. St. of Mah. Vs Sitaram Popat Vetal – AIR 2004 SC 4258.

13. Satender Kumar Antil Vs C.B.I.& anr. - 2022 SCC Online SC 825.

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

1. List has been revised.

2. Rejoinder affidavit filed by learned counsel for the applicant is taken on record.

3. Heard Ms. Gunjan Jadwani, learned counsel for the applicant and Sri Shubham Kesarwani, learned counsel for the opposite party no.2 as well as Sri Ashutosh Srivasava, learned A.G.A. for the State and perused the record.

4. By means of the present bail cancellation application, applicant is assailing the order dated 09.06.2023 passed by learned Sessions Judge, Rampur in Second Anticipatory Bail Application No. 906 of 2023 under Sections 420, 467, 468, 471, 386, 397, 115, 323, 504, 506 IPC, Police Station Kotwali, District Rampur in Complaint Case No. 5206 of 2022 during the pendency of trial.

5. Learned counsel for the applicant has stated that the accused/opposite party no.2 has not approached the said Sessions Court with clean hands, as such concealed the factum of criminal antecedents of two previous cases. The said fact can be verified from the order of the Sessions Judge dated 09.06.2023 passed in Crl. Misc. Anticipatory Bail Application No. 906 of 2023. It is true that he has been granted bail by this Court but the suppression of the said fact indicates that he is not entitled for anticipatory bail.

6. Per contra, learned counsel for the accused/opposite party no.2 has opposed the present bail cancellation application on the ground that the accused/opposite party no.2 is an advocate and he has categorically explained his criminal antecedents in both the cases in which closure report was filed and, as such, he did not mention the said fact, but it is true that he is on bail in case he was convicted.

7. In rebuttal, learned counsel for the applicant has stated that non-mentioning of criminal antecedents clearly goes against him and he has suppressed this fact. He has not approached the said court with clean hands, as such, the order dated 09.06.2023 is liable to be set aside.

8. The anticipatory bail application of co-accused Sadhna Singh and Sarla was also set aside by this Court on similar grounds for not explaining the criminal antecedents and the said order has been affirmed by the Supreme Court and, as such, the bail cancellation application is liable to be allowed.

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

*"30.This Court has reiterated in several instances that bail once granted, should not be cancelled in a mechanical manner without considering whether any supervening circumstances have rendered it no longer conducive to a fair trial to allow the accused to retain his freedom by enjoying the concession of bail during trial. Having said that, in case of cancellation of bail, very cogent and overwhelming circumstances are necessary for an order directing cancellation of bail (which was already granted). A two-Judge Bench of this Court in* ***Dolat Ram And Others v. State of Haryana*** *laid down the grounds for cancellation of bail which are:-*

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

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

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

*(iv) Possibility of accused absconding*

*(v) Likelihood of/actual misuse of bail*

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

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

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

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

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

*d) Where bail has been granted on untenable grounds.*

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

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

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

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

*"12...It is well settled in law that cancellation of bail after it is granted because the accused has misconducted himself or of some supervening circumstances warranting such cancellation have occurred is in a different compartment altogether than an order granting bail which is unjustified, illegal and perverse. If in a case, the relevant factors which should have been taken into consideration while dealing with the application for bail and have not been taken note of bail or it is founded on irrelevant considerations, indisputably the superior court can set aside the order of such a grant of bail. Such a case belongs to a different category and is in a separate realm. While dealing with a case of second*

*nature, the Court does not dwell upon the violation of conditions by the accused or the supervening circumstances that have happened subsequently. It, on the contrary, delves into the justifiability and the soundness of the order passed by the Court"*

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

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

*…….*

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

*…….*

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

10. The Supreme Court in **Mahipal v. Rajesh Kumar Alias Polia and Another** held that: -

*"17. Where a court considering an application for bail fails to consider relevant factors, an appellate court may justifiably set aside the order granting bail. An appellate court is thus required to*

*consider whether the order granting bail suffers from a non-application of mind or is not borne out from a prima facie view of the evidence on record. It is thus necessary for this Court to assess whether, on the basis of the evidentiary record, there existed a prima facie or reasonable ground to believe that the accused had committed the crime, also taking into account the seriousness of the crime and the severity of the punishment."*

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

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

13. The saying of Jonathan Swift:-

*"Laws are like cobwebs, which may catch small flies, but let wasps and hornets break through."*

14. The applicant carried more responsibility in explaining the criminal antecedents as he is a legal professional. The saying of Jonathan Swift applies to him.

15. The Supreme Court in umpteen number of cases has laid down that while granting bail to an accused, the Court should also take into consideration the criminal history of the accused. The criminal antecedents of an accused though always not determinative of question whether bail is to be granted or not, yet there relevance cannot be totally ignored.

**(i) Ash Mohammad Vs. Shiv Raj Singh,**

**(ii) Brij Nandan Jaiswal Vs. Munna Jaiswal,**

**(iii) Anil Kumar Tulsiyani Vs. State of U.P. ,**

**(iv) Sompal Singh Vs. Sunil Rathi,**

**(v) State of U.P. Vs. Amarmani Tripathi,**

**(vi) State of Maharashtra Vs. Sitaram Popat Vetal,**

16. It is true that the aforesaid judgments deal with regular bail application, but the yardsticks for anticipatory bail application are stricter to that of regular bail applications and the powers are to be used sparingly.

17. The parameters for granting anticipatory bail differ significantly from those for regular bail, as they address distinct legal situations and serve unique purposes. The primary objective of anticipatory bail is to protect an individual from arrest in anticipation of being accused of a non-bailable offense, especially when the allegations do not appear credible as his arrest could tarnish his image in the society.

18. A crucial consideration is the criminal antecedents of the accused, which must be seriously evaluated. If the accused has a history of criminal behavior, unexplained or otherwise, it could weigh heavily against the grant of anticipatory bail.

19. Given the preventive nature of anticipatory bail, the parameters and conditions imposed are typically stricter. These measures are necessary to prevent any misuse of the bail and to ensure the accused does not obstruct the course of justice by tampering with evidence, influencing witnesses, or evading trial.

20. Ultimately, the court seeks to strike a delicate balance between safeguarding individual liberty and upholding the interests of justice and public safety.

21. It is true that the opposite party no.2 has criminal antecedents and that too has not been explained, as such, the order granting anticipatory bail to the applicant cannot be sustained and him being a practising advocate makes his case worse. His anticipatory bail was hit by Section 438(1)(ii) Cr.P.C. also.

22. After hearing the parties and taking into consideration that the accused/respondent no.2 has not mentioned the factum of previous criminal antecedents. Although, it may be true that the closure report may have been filed. It is further added that the counsel for the accused/respondent no.2 has even not filed the said closure reports or any order indicating the accepting of said closure report in this counter affidavit also and it has also to be considered that the fact finds mentioned in paragraph no.3 of the bail order dated 09.06.2023 whereby it has been stated that the accused/respondent no.2 has no criminal antecedents. Therefore, the impugned order dated 09.06.2023 passed by Sessions Judge, Rampur in Crl. Misc. Anticipatory Bail Application No. 906 of 2023 is not sustainable and is liable to be set aside.

23. In view of the above, the instant bail cancellation application is allowed. The impugned bail order dated 09.06.2023 passed by learned Sessions Judge, Rampur is hereby set aside.

24. However, three weeks' time from the date of pronouncement of this Judgment is granted to opposite party no. 2 to surrender before the concerned Trial Court and thereafter it will be open for them to pray for regular bail, which may be considered in accordance with law laid down by the Apex Court in the case of **Satender Kumar Antil vs. Central Bureau of Investigation and another.**

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**(2024) 11 ILRA 541**
**APPELLATE JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 14.11.2024**

**BEFORE**

**THE HON'BLE ASHWANI KUMAR MISHRA, J.**
**THE HON'BLE DR. GAUTAM CHOWDHARY, J.**

Criminal Appeal No. 2289 of 2022

**Ram Krishna @ Ram Kishan ...Appellant**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Appellant:**
Aman Kumar, Surendra Pal

**Counsel for the Respondents:**
G.A.

**Criminal Law - Criminal Procedure Code, 1973 - Sections 161, 164 & 313 - Indian Penal Code, 1860 - Sections – 376-d, 506 & 506(2) - The Protection of Children from Sexual Offences Act, 2012 – Sections 3, 4 & 42:** - Appeals – against Conviction and Sentence – FIR - offence of abduction and sexually assault to a minor girl - charges-sheet - cognizance – sentence –- Trial Court relying on witness testimonies and legal precedents - convicted the accused appellant and sentenced to life imprisonment and imposing fines – appeal – Evaluation of Evidence - the appellate court found, - significant inconsistencies in the evidence, - contradictions in the victim's St.ments - delay in FIR registration and - the trial court failed to comment on the medico-legal report, a crucial piece of evidence - the appellate court ruled that the prosecution failed to establish the allegations beyond reasonable doubt, granting the appellant the benefit of doubt, consequently – held, the prosecution failed to prove the allegations beyond a reasonable doubt - impugned judgment set aside – present appeal is allowed – acquitted from charges - direction issued for releasing him, accordingly. (Para – 20, 21, 22)

**Appeal Allowed.** (E-11)

**List of Cases cited:**

1. Sadashiv Ramrao Hadbe Vs St. of Mah., 2007 (1) SCC (Cri.) 161,

2. Ganga Singh Vs St. of M.P. from 2013 AIR SC 3008,

3. Parminder Vs Delhi St. - 2014 vol. 2 SCC 592,

4. St. of T.N. Vs Ravi @ Nehru - 2006 vol. 55 ACC – 1005 SC,

(Delivered by Hon'ble Dr. Gautam Chowdhary, J.)

१. अपीलार्थी/अभियुक्त **राम किशोर उर्फ राम किशन** की ओर से यह दाण्डिक अपील, मु०अ०सं० 436/2018 अन्तर्गत धारा 376डी, 506 भा०दं०वि० एवं धारा 3/4 लैगिंक अपराधों से बालकों का संरक्षण अधिनियम 2012, थाना नवाबगंज, जनपद बरेली से उद्भूत फौजदारी वाद सं० 303 वर्ष 2020 में विशेष न्यायाधीश, पाक्सो एक्ट/अपर सत्र न्यायाधीश, बरेली द्वारा पारित निर्णय दिनांक 23.02.2022, जिसके द्वारा अपीलार्थी/अभियुक्त को धारा 376डी भा०दं०वि० के अधीन आजीवन कारावास एवं एक लाख रूपये के अर्थदण्ड व अर्थदण्ड अदा न करने की दशा में छः-छः माह का अतिरिक्त साधारण कारावास तथा धारा 506 (2) भा०दं०वि० के अधीन पांच वर्ष कारावास एवं सात हजार रूपये के अर्थदण्ड व अर्थदण्ड अदा न करने की दशा में एक माह का अतिरिक्त करावास के दण्ड से दण्डित किया गया है, के विरूद्ध योजित किया गया है।

२. वाद के तथ्य संक्षेप में इस प्रकार है कि अभियोगी सोहनलाल निवासी ग्राम पचुआ पैगा, थाना नवाबगंज, जिला बरेली ने इस आशय का टाइपशुदा प्रार्थना पत्र वरिष्ठ पुलिस अधीक्षक, बरेली को दिया कि उसकी नाबालिग पुत्री/पीड़िता, उम्र करीब सोलह वर्ष दिनांक 31.8.2018 को सुबह करीब 08.00 बजे उसके ममेरे साले का लड़का कृष्णपाल पुत्र शंकरलाल, निवासी इटौआ केदारनाथ, थाना भोजीपुरा, बरेली दवा दिलाने ग्राम बरौर गया था, लेकिन बरौर न जाकर रास्ते में कृष्णपाल के बहनोई का भाई नाम नही

मालूम, निवासी अमसा, थाना हाफिजगंज आ गया और अभियोगी की पुत्री पीड़िता को रूमाल से कुछ सुघां दिया, जिससे यह बेहोश हो गयी और अंजान जगह ले जाकर दोनों ने बारी-बारी पीड़िता के साथ अश्लील हरकते की व बिना मर्जी के बुरा काम किया। पीड़िता को जब होश आया तो वह नग्न अवस्था में थी, दोनों लोग पीड़िता की फोटो खींच रहे थे और पीड़िता से एक सादे कागज पर अंगूठा लगवा लिया और कहां कि अगर कोई कार्यवाही की तो तुम्हारा फोटो सब को दिखा देंगे और यह कागज तेरी मर्जी से लिख लेंगे, सबको दिखा देंगे, फिर रूमाल मुँह पर रख दिया जिससे वह पुनः बेहोश हो गयी। शाम को जब आँख खुली तो देखा कि एक खेत की मेड़ पर लेटी है। प्रार्थी की पुत्री/पीडिता उठी और सहमी हुई रोड पर आयी तो देखा कि गाँव हमसा की रोड है और बड़ी मुश्किल से अपने घर पहुँची। सारी घटना पीड़िता ने अपनी माँ को बताया, तब उसकी की पत्नी ने उसे खेत से बुलाया और सभी लोग कृष्णपाल के घर गये, परन्तु वहाँ कोई नहीं मिला। अगले दिन दिनांक 01.9.2018 को अभियोगी थाना नवाबगंज गया, लेकिन कोई रिपोर्ट नहीं लिखी गयी। प्रार्थी काफी मानसिक रूप से परेशान हो रहा है। याचना की गयी कि रिपोर्ट दर्ज करके कानूनी कार्यवाही करने की कृपा करें।

३. अभियोगी के तहरीर के आधार पर थाना नवाबगंज, जिला बरेली पर मु०अ०सं0-436/2018, अन्तर्गत धारा 376 भा०दं०सं० व धारा 3/4 पाक्सो अधिनियम में अपीलार्थी/अभियुक्त कृष्णपाल एवं कृष्णपाल के बहनोई के भाई नाम नहीं मालूम के विरूद्व पंजीकृत की गयी। विवेचक द्वारा इस मामले की विवेचना के दौरान दिनांक 29.09.2018 व दिनांक 24.11.2018 को पीड़िता की मां, पीड़िता का मजीद बयान लेखबद्ध किया गये है। दिनांक 05.10.2018 को पर्चा-5 में पीड़िता की आयु परीक्षण रिपोर्ट का विवरण अंकित किया गया है व पीड़िता द्वारा अपना आतंरिक परीक्षण कराने से इंकार किया गया है तथा दिनांक 20.10.2018 को पीड़िता का धारा 164 दं०प्र०सं० का बयान अंकित किया गया। दिनांक 11.11.2018 को अपीलार्थी/अभियुक्त की गिरफ्तारी की गयी है। दिनांक 28.11.2018 को पीड़िता की चढ़ढी कब्जा पुलिस लिया गया है, फर्द बनाकर गवाहान के हस्ताक्षर बनवाकर सील मुहर किया गया, जिसको परीक्षण हेतु दिनांक 15.12.2018 को विधि विज्ञान प्रयोगशाला मुरादाबाद प्रेषित किया गया है एवं साक्ष्य संकलन के उपरांत अपीलार्थी/अभियुक्त कृष्णपाल व राम किशोर के विरूद्ध आरोप पत्र न्यायालय में दाखिल किया गया।

४. अपीलार्थी/अभियुक्त के न्यायालय में हाजिर होने पर दिनाँक 13.08.2019 को आरोप अन्तर्गत धारा-376डी, 506 भा०दं०सं० एवं धारा 4 लैगिक अपराधों से बालकों का संरक्षण अधिनियम 2012 के अधीन विरचित किया गया। अपीलार्थी/अभियुक्त द्वारा आक्षेपित आरोप से इंकार करते हुए विचारण किये जाने की माँग किया गया।

५. अभियोजन की तरफ से अभियोजन कथानक को प्रमाणित करने के लिए दस्तावेजी साक्ष्य के रूप में टाइपशुटा तहरीर वादी प्रदर्श क-1, मेडिको लीगल रिपोर्ट प्रदर्श क-2, बयान पीड़िता अन्तर्गत धारा 164 दं०प्र०सं० प्रदर्श क-3, संकलित/बरामद पीड़िता का एक अदद चढ्ढी काले रंग का प्रदर्श क-4, प्रथम सूचना रिपोर्ट की प्रति प्रदर्श क-5, जी० डी० की प्रति प्रदर्श क-6, नक्शा-नजरी घटनास्थल प्रदर्श क-7, आरोप पत्र प्रदर्श क-8, गिरफ्तारी मेमो अपीलार्थी/अभियुक्त कृष्णपाल व राम किशोर प्रदर्श क-9, विधि विज्ञान प्रयोगशाला की रिपोर्ट प्रदर्श क-10, परीक्षण रिपोर्ट का सीलबन्द लिफाफा प्रदर्श क-11, प्रवेश रजिस्टर पीडिता प्रदर्श क-12, पीडिता का टी०सी० राजकीय प्राथमिक विद्यालय मोतीनगर, हल्द्वानी प्रदर्श क-13, प्रधानाचार्य राजकीय प्राथमिक विद्यालय मोतीनगर हल्द्वानी द्वारा निर्गत शैक्षिक प्रमाण पत्र प्रदर्श क-14 तथा प्रवेश पंजिका पीड़िता प्रदर्श क-15 प्रस्तुत किया गया है।

६. अभियोजन की तरफ से अभियोजन कथानक को परिपुष्ट करने के लिए वाचनिक साक्षी के रूप में अभियोजन साक्षी- 01.सोहनपाल, अभियोजन साक्षी- 02. पीड़िता, अभियोजन साक्षी- 03. तारावती, अभियोजन साक्षी- 04. डा० अनीता धस्माना, अभियोजन साक्षी-05. आ० मनोज कुमार, अभियोजन साक्षी-06. उ०नि० दलवीर सिंह, अभियोजन साक्षी-07. श्रीकान्त द्विवेदी, अभियोजन साक्षी-08. प्रधानाचार्य, राजकीय जू० हा० प्राथमिक विद्यालय मोतीनगर, हल्द्वानी को न्यायालय में परीक्षित कराया गया।

७. अपीलार्थी/अभियुक्त का बयान अन्तर्गत धारा 313 दं०प्र०सं० दिनाँक 10.02.2022 को अंकित किया गया, जिसमें सहअभियुक्त कृष्णपाल द्वारा मुकदमे को तरतीब देने, गलत आरोप लगाने, जया आर्या द्वारा प्रवेश फार्म पेश न करने, जमीन के विवाद के कारण मुकदमा चलना, गवाहान द्वारा गवाही जमीन खरीदने के वास्ते दबाव देने के कारण, देना कहा है तथा जमीन के विवाद में झूठा परेशान करने का भी कथन किया गया है। सफाई में साक्ष्य देने से इंकार किया गया एवं इसी प्रकार का कथन अपीलार्थी/अभियुक्त राम किशोर उर्फ राम किशन द्वारा भी किया गया है, परन्तु व्यक्तिगत रूप से पीड़िता को न जानने व झूठा फँसाने का अतिरिक्त कथन किया है।

८. अभियोजन पक्ष की ओर से अभियोजन कथानक को प्रमाणित करने के लिए **अभियोजन साक्षी- 01. अभियोगी सोहनपाल** को परीक्षित कराया गया है, जिसके द्वारा अपने मुख्य परीक्षा में अपने धारा 161 दं०प्र०सं० के बयान की पुनरावृत्ति की गयी तथा अभियोजन साक्षी ने अपने हस्ताक्षर को प्रमाणित किया जिस पर प्रदर्श क-1 डाला गया। साथ ही यह भी अभिकथित किया गया कि घटना के सम्बन्ध में मेरा बयान दरोगा जी ने लिया था, मैंने घटनास्थल का मौका मुआयना कराया था। जिरह में कथन किया कि अपीलार्थी/अभियुक्त कृष्णपाल, शंकर का लड़का है। मेरे सामने मेरी लड़की किसी के साथ नहीं भागी थी, एक सप्ताह बाद रिपोर्ट लिखाने गया था। पीड़िता जिस दिन गयी थी, उसी दिन आ गयी थी, पीड़िता से मेरी कोई बात नहीं हुई थी जो पत्नी ने मुझे बताया, वही तहरीर में लिखवाया, मैंने यह सूचना एक सप्ताह बाद दी थी।

९. **अभियोजन साक्षी सं० 02. पीड़िता** को परीक्षित कराया गया है, जिसके द्वारा अपनी मुख्य परीक्षा में कथन किया गया कि "घटना आज से लगभग एक साल पहले सुबह आठ बजे की है। घटना वाले दिन मुझे बुखार आ रहा था, मैं दवा लेने बरौर जा रही थी, रास्ते में मेरे ममेरे भाई कृष्णपाल ने जबरदस्ती मोटर साइकिल पर बैठा लिया और मेरे मुँह पर रूमाल लगा दिया तथा सादे कागज पर मेरा अंगूठा लगवा लिया, फिर वह मुझे गन्ने के खेत में जबरदस्ती ले गया और मेरे साथ जबरदस्ती गलत काम किया। यह घटना दिनॉक 31.8.2018 समय सुबह 8.00 बजे की बरौर कस्बे की है। कृष्णपाल के साथ उसका बहनोई राम किशोर भी था, उसने भी मेरे साथ गलत काम किया। राम किशोर ने मुझे मोटरसाइकिल पर जबरदस्ती बैठाया था। मैं घर पहुँची, घटना के बारे में अपनी माँ से बताया था, घटना के संबंध में पिताजी अगले दिन धाना नवाबगंज रिपोर्ट लिखाने गये थे तो रिपोर्ट नहीं लिखी फिर पिताजी ने एस.एस.पी. बरेली को प्रार्थना पत्र दिया था जिस पर मेरी रिपोर्ट लिखी गयी, मैंने महिला कांस्टेबल को बोलकर अपने बयान लिखवाया था, गवाह को उसका धारा 161 दं०प्र०सं० का बयान पढ़कर सुनाया व दिखाया गया तो कहा कि यह वही बयान है, जो मैने दिया था। मैं हल्द्वानी में पाँच-छः वर्ष से रह रही हूँ, इसके पूर्व मैं अपने गाँव में माता पिता के साथ रहती थी। पाँच-छः वर्ष पूर्व से भी हल्द्वानी आती जाती रहती थी, जब पहली बार होश आया उस समय सत्रह वर्ष की थी, इसके पूर्व कक्षा चार से पढ़ना शुरू किया था, इसके पहले अपने गाँव में बरेली में पढ़ी थी, जब अपीलार्थी/अभियुक्त मुझे ले गये उस समय बरसात का मौसम था। उस समय सुबह आठ बजे डाक्टर के पास बरौर नहीं पहुँची थी, अपीलार्थी/अभियुक्त ने मेरे

साथ गलत काम किया, घटना गाँव के स्कूल के पास हुई थी जो गाँव के किनारे है। रूमाल सुधाते ही मैं बेहोश हो गयी थी मेरी आँख बन्द हो गयी थी, इसके बाद मैं कुछ नहीं देख पायी थी, मेरा डाक्टरी मुआयना हुआ था। घटना के दो-तीन घण्टे बाद होश आया था, जिस खेत में मेरे साथ घटना हुई उसमें धान की फसल लगी थी, घटना के समय सूट पहने थी, सूट के नीचे अण्डरगार्मेन्ट था जो आज मेरे सामने नहीं है, मैं इन कपड़ो को थाने में दो-तीन दिन बाद दे दिया था एवं साक्षी को धारा 164 द०प्र०सं० का बयान पढ़कर सुनाया व दिखाया गया तो पीड़िता ने उस पर लगे फोटो को अपना होना बताया, जिस पर मेरा निशानी अंगूठा लगा है. जिसे पुष्टि करती हूँ जिस पर प्रदर्श क-3 डाला गया।"

१०. **अभियोजन साक्षी सं० 03. तारावती/पीड़िता की माँ** को परीक्षित कराया गया है, जिनके द्वारा अपने मुख्य परीक्षा में कथन किया गया कि "पीड़िता मेरी पुत्री है, घटना के समय वह नाबालिग थी जिसकी उम्र उस समय सोलह सत्रह वर्ष थी। घटना वाले दिन पीड़िता को बुखार आ रहा था, कृष्णपाल ग्राम इटौआ केदारनाथ का रहने वाला है, राम किशोर, कृष्णपाल का बहनोई है। यह दोनो मेरी बेटी को दवा दिलाने के बहाने घर से बुलाकर ले गये, लेकिन अस्पताल नहीं ले गये, इन्होंने बड़ा बुरा काम करा। मेरी बेटी को नशा सुंघाकर रूमाल में दिया था, गन्ने के खेत में इन लोगों ने मेरी बेटी के साथ बारी-बारी गलत काम किया और जान से मारने की धमकी दी थी कि बात किसी को बतायीं तो जान से मार देंगे। मेरी बेटी ने उक्त बात आकर मुझे बतायी थी, तब मैने अपने पति को बताया, तब मेरे पति ने घटना की रिपोर्ट लिखवायी थी। विवेचक ने मेरा बयान लिया था। जिरह में कथन किया कि "बलात्कार मेरे सामने नही हुआ था बल्कि पीड़िता ने बलात्कार वाली बात बतायी थी, पीड़िता को मुल्जिमान घर से मेरे सामने ले गये थे, जिस समय ये दोनों बुलाकर ले गये उस समय मुझे कल्पना नहीं थी कि यह दोनों गलत काम करेंगे।

११. **अभियोजन साक्षी सं०- 4. डा० अनीता धस्माना** को परीक्षित कराया गया है, जिनके द्वारा अपनी मुख्य परीक्षा में कथन किया गया कि दिनांक 29.9.2018 को बतौर वरिष्ठ परामर्शदाता महिला जिला अस्पताल, बरेली में तैनात थी। उस दिन पीडिता को चिकित्सीय परीक्षण हेतु महिला कां० तारा देवी द्वारा लाया गया था, उसके साथ पिता सोमपाल भी थे, उन्होंने पीड़िता का आन्तरिक एवं बाह्य चिकित्सीय परीक्षण कराने से मना कर दिया था। उसके उपरांत पीड़िता व उनके पिता का निशानी अंगूठा प्रमाणित किया गया।

१२. **अभियोजन साक्षी सं०-5. कां० मनोज कुमार** को परीक्षित कराया गया है,

जिनके द्वारा अपनी मुख्य परीक्षा में कथन किया गया कि दिनांक-18.9.2018 को थाना नवाबगंज में कां० के पद पर तैनात था। समय 12.30 बजे एक डाक पैड से प्रार्थनापत्र आदेशित एस.एस.पी. बरेली व एस.एच.ओ. नवाबगंज प्राप्त हुआ, जिसके आधार पर मेरे द्वारा सी./सी. टी.एन.एस. से कम्प्यूटर पर मु०अ०सं० 456/2018 अन्तर्गत धारा 376 भा० दं० सं० व धारा 3/4 पाक्सो अधिनियम राज्य बनाम कृष्णपाल आदि, प्रार्थनापत्र से शब्द ब शब्द बोलकर टाइप कराया था। इस मुकदमें का खुलासा मेरे द्वारा नकल रपट सं0 31, दिनांक 18.9.2018 को 12.30 बजे ही कम्प्यूटर पर टाइप करवाकर किया। पत्रावली में शामिल कागज सं० 8ख/8 नकल रपट सी०डी० मेरे द्वारा कम्प्यूटर पर बोलकर टाइप करायी गयी जो पत्रावली में शामिल है, जिस पर दिवसाधिकारी के हस्ताक्षर हैं तथा थाना कार्यालय की मुहर लगी है जिस पर प्रदर्श क-6 डाला गया। प्रदर्श क-1 पर एस.एच.ओ. नवाबगंज द्वारा प्रथम सूचना रिपोर्ट दर्ज करने का आदेश दिया गया तथा वरिष्ठ पुलिस अधीक्षक की मुहर लगी होने के कारण एस.एच.ओ. ने यह मुकदमा पंजीकृत कराया था।

१३. **अभियोजन साक्षी सं०-6. उ०नि० बलवीर सिंह** को परीक्षित कराया गया है, जिनके द्वारा अपनी मुख्य परीक्षा में कथन किया गया कि उपनिरीक्षक अरविन्द सिंह चौहान मेरे साथ तैनात रहे जिन्हें लिखते पढ़ते देखा है और उनके लेख व हस्ताक्षर को पहचानता हूँ, मेरे द्वारा मु०अ०सं० 436/2018, धारा 376 भा०दं०वि० व धारा 3/4 पाक्सो अधिनियम की विवेचना ग्रहण करके पर्चा-1 में नकल चिक, नकल रपट का विवरण अंकित किया। प्रथम सूचना रिपोर्ट के लेखक कां०/क० मनोज कुमार का बयान अंकित किया, उनके द्वारा वादी के मोबा० नं0 7409008231 पर सम्पर्क करके पीड़िता के बयान अंकित कराने हेतु बुलाया गया। दिनाँक 25.9.2018 को वरिष्ठ पुलिस अधीक्षक महोदय के आदेश से विवेचना मुझ एस.एच. ओ. द्वारा ग्रहण पर्चा-2 में की गयी। दिनाँक 29.9.2018 को पर्चा-3 में वादी तथा पीड़िता के बयान लेखबद्ध किया गया। बयान अन्तर्गत धारा 161 दं०प्र०सं० का अवलोकन कर जी.डी. में अंकित किया जो एल.सी. सोनिया द्वारा लेखबद्ध किया गया तथा वादी की निशादेही पर घटनास्थल का निरीक्षण कर नक्शा-नजरी तैयार किया गया। पत्रावली में शामिल नक्शा-नजरी प्रदर्श 5क मेरे लेख व हस्ताक्षर में है, जिसकी पुष्टि करता हूँ जिस पर प्रदर्श क-7 डाला गया।

१४. **अभियोजन साक्षी सं० 7. उ०नि० श्रीकान्त द्विवेदी** को परीक्षित कराया गया है, जिनके द्वारा अपनी मुख्य परीक्षा में कथन किया गया कि दिनाँक 03.10.2018 को थाना नवाबगंज में बतौर एस.एच.ओ.

तैनात था। उस दिन मैंने मु०अ०सं० 436/2018, धारा 376 भा०दं०वि० व धारा 3/4 पाक्सो अधिनियम की विवेचना ग्रहण की थी, जिसमें पर्चा 4 में पूर्व विवेचक द्वारा किता की गयी सी.डी. का अवलोकन किया। **दिनाँक 05.10. 2018 को पर्चा 5 में पीड़िता की आयु परीक्षण रिपोर्ट का विवरण अंकित किया। पीड़िता ने अपने आन्तरिक परीक्षण कराने से इंकार कर दिया है।** दिनाँक 20.10.2018 को पर्चा-9 में पीड़िता के बयान अन्तर्गत धारा-164 दं०प्र०सं० का अवलोकन करके उसका विवरण अंकित किया। पीड़िता द्वारा अपनी आयु शैक्षिक प्रमाण पत्र राजकीय प्राथमिक विद्यालय मोतीनगर क्षेत्र अर्जुनपुर, हल्द्वानी जनपद नैनीताल प्रस्तुत किया जिसके अनुसार पीड़िता की जन्म तिथि 15.6.2001 है। पीड़िता की उम्र सत्रह वर्ष दो माह पन्द्रह दिन होती है। दिनाँक 11.11.2013 को पर्चा-11 में जरिये मुखबीर सूचना मिली कि पछुआ पैगा में दोनो मुल्जिमान मेन चौराहे बाईगाता बीजानऊ गेट करबा नवाबगंज में खड़े होकर गाड़ी का इंतजार कर रहे हैं, समय 18.00 बजे दोनों मुल्जिमान को गिरफ्तार करके थाने में दाखिल करके उनका बयान अंकित किया गया। दिनांक 12.11.2018 को पर्चा 12 में मुल्जिमान का मेडिकल परीक्षण सी.एच.सी. नवाबगंज में कराकर उसका विवरण अंकित किया गया। दिनाँक 28.11.2018 को पर्चा 16 में पीड़िता की चढ़्ढी कब्जा पुलिस लिया, फर्द बनाकर गवाहान के हस्ताक्षर बनवाकर सील मुहर किया। पत्रावली में शामिल फर्द मेरे लेख व हस्ताक्षर में है जिसकी पुष्टि करता हूँ, जिस पर प्रदर्श क-4 पूर्व में डाला जा चुका है तथा फर्द के गवाहान के बयान लिखे। मुकदमें में संकलित की गयी साक्ष्य से पर्याप्त आधार पाते हुए अपीलार्थी/अभियुक्त कृष्णपाल व रामकिशोर उर्फ राम किशन के विरूद्ध जुर्म धारा 376डी, 506 भा० दं० सं० द धारा 3/4 पाक्सो अधिनियम के अन्तर्गत आरोप पत्र सं०- 462/2018 न्यायालय में प्रस्तुत किया गया। केस डायरी के हस्ताक्षर की पुष्टि करता हूँ जिस पर प्रदर्श क-8 डाला गया। अपीलार्थी/अभियुक्त के गिरफ्तारी मेमो मेरे लेख व हस्ताक्षर में है जिसे पुष्ट करता हूँ जिस पर प्रदर्श क-9 डाला गया। पत्रावली में शामित विधि विज्ञान प्रयोगशाला की परीक्षण रिपोर्ट तथा प्राप्ति रसीद पत्रावली में शामिल है जिस पर मैने रवानगी जी०डी० का उल्लेख किया।

१५. **अभियोजन साक्षी सं० 8. प्रधानाचार्य, राजकीय प्राथमिक विद्यालय मोतीनगर हल्द्वानी, जिला नैनीताल** को परीक्षित कराया गया है, जिनके द्वारा अपनी मुख्य परीक्षा में कथन किया कि "पीड़िता ने हमारे विद्यालय में कक्षा एक में दिनाँक 19.03.2007 को प्रवेश लिया था, कक्षा एक से दो तक दिनांक 30.9.2009 तक अध्ययनरत रही। पीड़िता की मूल प्रवेश रजिस्टर को साथ लेकर आयी हूँ, मूल

टी.सी. भी लायी हूँ। एस.आर. रजिस्टर व टी.सी. के क्रमांक सं0 1287 पर पीड़िता पुत्री की जन्म तिथि 15.6.2001 अंकित है। उक्त छात्रा जनपद बरेली उत्तर प्रदेश की रहने वाली थी, मैं उक्त छात्रा के प्रवेश रजिस्टर व टी. सी. की प्रमाणित प्रतियां दाखिल कर रही हूँ, जिस पर कमशः प्रदर्श क 12 व प्रदर्श क-13 डाला गया। पत्रावली में शामिल कागज सं० 4ख/20 में जन्म तिथि 15.6.2000 अंकित है जिसे मैं अपने हस्ताक्षर से प्रमाणित करती हूँ, जिस पर प्रदर्श क-14 डाला गया है। प्रवेश पत्र उत्तराखण्ड राज्य का है।

१६. विचारण न्यायालय ने मामले में उभयपक्ष के विद्वान अधिवक्ताओं को सुनने तथा मामले में दिये गये तथ्यों एवं साक्ष्यों के आधार एवं परिमिन्दर बनाम दिल्ली राज्य (2014) 2 एस.सी.सी.592 एवं तमिलनाडु राज्य बनाम रवि उर्फ नेहरू 2006 (55) ए सी सी 1005 सुप्रीम कोर्ट एवं गंगा सिंह प्रति मध्य प्रदेश राज्य 2013 सुप्रीम कोर्ट 3008 एवं अन्य बहुत सी नजीरों के आधार तथा अभियोजन साक्षीगण व बचाव साक्षियों के साक्ष्य के आधार पर विचारण न्यायालय ने यह पाया कि अभियोजन पक्ष ने अपना मामला उचित संदेह से परे स्थापित किया है, जिसके आधार पर विचारण न्यायालय द्वारा अभियुक्त रामकिशोर उर्फ राम किशन को धारा 376डी भा०दं०वि० के अधीन आजीवन कारावास और एक लाख रूपये के अर्थदण्ड व अर्थदण्ड अदा न करने की दशा में छः-छः माह का अतिरिक्त साधारण कारावास एवं धारा 506 (2) भा०दं०वि० के अधीन पांच वर्ष कारावास और सात हजार रूपये के अर्थदण्ड व अर्थदण्ड अदा न करने की दशा में एक माह का अतिरिक्त करावास के दण्ड से दण्डित किया गया है।

१७. **अपीलार्थी/अभियुक्त के दोषसिद्धि और सजा के प्रश्नगत निर्णय/आदेश को चुनौती देते हुए उसके विद्वान अधिवक्ता ने यह तर्क प्रस्तुत किया किः-**

(क) विचारण न्यायालय द्वारा अपीलार्थी/अभियुक्त के खिलाफ दोषसिद्धि व सजा का निष्कर्ष उचित नहीं है, क्योंकि तथ्य के अभियोजन साक्षीगण के बयानों में विरोधाभाष है। उनके द्वारा यह भी कथन किया गया कि प्रथम सूचना रिपोर्ट विधिक सलाह व राजनीतिक दबाव के उपरांत अति विलंब से पंजीकृत करायी है, इसका कोई समुचित स्पष्टीकरण प्रस्तुत नहीं किया गया है। यहां विचारणीय तथ्य यह भी है कि जब पुलिस द्वारा कथित पीड़िता का चिकित्सीय परीक्षण कराने हेतु चिकित्सालय ले जाया गया तब पीड़िता के पिता द्वारा पीड़िता का चिकित्सीय परीक्षण कराने से इंकार कर दिया गया है, जो धारा 164ए दं०प्र०सं० का उल्लघंन है। यह कथित घटना

के संदिग्धता को परिलक्षित कर रहा है एवं इस बात का समर्थन अभियोजन साक्षी सं०-4 डा० अनीता धस्माना के बयान से भी स्पष्ट होता है जिन्होंने अपने बयान में कथन किया कि "पीड़िता के चिकित्सीय परीक्षण के समय उसके पिता आये थे, उन्होंने अपनी पुत्री का आंतरिक एवं बाह्य परीक्षण कराने से मना कर दिया था।"

(ख) उनके द्वारा यह भी तर्क प्रस्तुत किया गया कि अभियोगी ने अपनी तहरीर में खेत की मेड़ पर आँख खुलने पर पीड़िता को पाना कहा है, मौखिक बयान में भी वही बयान दिया गया है, जबकि पीड़िता/अभियोजन साक्षी सं०-02 ने अपनी मुख्य परीक्षा में घटनास्थल गन्ने का खेत होना कहा है, जबकि जिरह में घटनास्थल के पास धान का खेत होना कहा है, इससे घटनास्थल भिन्न-भिन्न हो जाता है तथा घटनास्थल संदिग्ध हो जाता है।

(ग) पीड़िता/अभियोजन साक्षी सं०-02 ने अपने बयान में कहा कि जब वह घर से बाहर दवा लेने के लिए जा रही थी, उसे रास्ते में अभियुक्त कृष्णपाल ने जबरदस्ती मोटर साइकिल पर जबरदस्ती बैठा लिया तथा उसी बयान में राम किशोर को जबरदस्ती मोटर साइकिल पर बैठाना कहा है, जबकि पीड़िता की मां ने पीड़िता को अभियुक्त कृष्णपाल के द्वारा घर से अपनी मोटरसाइकिल द्वारा ले जाना कहा है तथा अभियोगी ने अपनी तहरीर में फोटो खींचना कहा है, जबकि फोटों खींचने वाली बात पीड़िता ने अपने बयान अन्तर्गत धारा 164 दं०प्र०सं० में अभिकथित नहीं किया है और न ही अभियोजन पक्ष द्वारा कथित कोई अश्लील फोटो पत्रावली पर दाखिल किया गया है।

(घ) उनका यह भी तर्क है कि कथित पीड़िता के आयु के संबंध में प्रस्तुत प्रदर्श-7क/शैक्षिक प्रमाण पत्र की प्रमाणिकता संदेहास्पद है, क्योंकि अभियोजन साक्षी सं० 8/प्रधानाचार्य राजकीय प्राथमिक विद्यालय मोतीनगर हल्द्वानी, जिला नैनीताल द्वारा अपने परीक्षण में यह कथन किया गया कि "यह कहना सही है कि प्रवेश के समय जन्मतिथि के संबंध में कोई अन्य शपथ-पत्र या जन्म के संबंध में कोई प्रमाण पत्र नगर निगम, ग्राम पंचायत या प्रधान का मेरे द्वारा नहीं लिया गया था और न ही सोहन लाल द्वारा ही दिया गया था।" और न ही उपरोक्त शैक्षणिक/स्थानांतरण प्रमाण प्रपत्र को संबंधित सक्षम उच्चाधिकारी द्वारा प्रतिचिन्हित किया गया है।

(च) यहां अति विचारणीय तथ्य यह भी है कि कथित घटना में पीड़िता का बरामद/संकलित अंडरवियर, जिसे जांच हेतु प्रयोगशाला प्रेषित किया गया था, विधि विज्ञान प्रयोगशाला, उ०प्र० मुरादाबाद से प्राप्त रिपोर्ट के परिक्षण परिणाम में "वस्तु-अंडरवियर पर मानव रक्त पाया गया।, वस्तु- अंडरवियर पर शुक्राणु तथा वीर्य नहीं पाया गया" अंकित है, जो अभियोजन कहानी को पूर्णतः असत्य परिलक्षित कर

रहा है। इस प्रकार कथित घटना में अपीलार्थी/अभियुक्त की भूमिका संदेह से परे साबित नहीं हो रही है।

१८. विद्वान अपर शासकीय अधिवक्ता द्वारा यह तर्क प्रस्तुत किया है कि अपीलार्थी/अभियुक्त द्वारा गंभीर अपराध कारित किया गया है एवं विचारण न्यायालय ने रिकॉर्ड पर उपलब्ध साक्ष्यों पर विचारोपरांत दोषसिद्धि के निष्कर्ष पर पहुंचने के उपरांत अपीलार्थी/अभियुक्त को आजीवन कारावास की सजा सुनाई है, इसलिए विचारण न्यायालय द्वारा पारित दोषसिद्धि के निर्णय/आदेश में कोई अवैधता या विकृति नहीं है और इस प्रकार आरोपित निर्णय और दोषसिद्धि के आदेश में किसी हस्तक्षेप की आवश्यकता प्रतीत नहीं हो रही है।

१९. प्रश्नगत प्रकरण में अभियोजन साक्षीगण के अभिकथनों एवं पत्रावली पर उपलब्ध साक्ष्यों के आधार पर विचारण न्यायालय इस निर्ष्कष पर पहुंचा कि अभियुक्त राम किशोर द्वारा अन्य सहअभियुक्त कृष्णपाल के साथ मिलकर अवयस्क पीड़िता को दवा दिलाने के बहाने से घर से ले जाकर उसकी इच्छा के विरूद्ध रूमाल सूंघाकर जबरदस्ती सामूहिक रूप से बलात्कार किया गया तथा पीड़िता के साथ गुरूत्तर लैंगिक प्रवेशन हमला कारित किया गया, क्योंकि अभियोजन द्वारा पीड़िता के बयान, वादी की तहरीर व धारा 164 दं०प्र०सं० के बयान से घटना को पूर्ण रूप से साबित किया गया है तथा विचारण न्यायालय ने गंगा सिंह प्रति मध्य प्रदेश राज्य 2013 सुप्रीमकोर्ट 3008 में प्रतिपादित विधि-व्यवस्था के आलोक में विचारण न्यायालय द्वारा अभियुक्त राम किशोर को धारा 376डी भा०दं०वि० के अधीन आजीवन कारावास और एक लाख रूपये के अर्थदण्ड व अर्थदण्ड अदा न करने की दशा में छः-छः माह का अतिरिक्त साधारण कारावास एवं धारा 506 (2) भा०दं०वि० के अधीन पांच वर्ष कारावास और सात हजार रूपये के अर्थदण्ड व अर्थदण्ड अदा न करने की दशा में एक माह का अतिरिक्त करावास के दण्ड के अधीन दण्डित किया गया है, किंतु विचारण न्यायालय द्वारा प्रश्नगत आदेश पारित करते समय पीड़िता के मेडिको-लीगल रिपोर्ट व विधि विज्ञान प्रयोगशाला, मुरादाबाद, उ०प्र० द्वारा निर्गत परीक्षण रिपोर्ट के अवलोकन के संबंध में कोई टिप्पणी नहीं की गयी है।

२०. **अपीलार्थी/अभियुक्त के विद्वान अधिवक्ता एवं उत्तर प्रदेश राज्य की ओर से विद्वान अपर शासकीय अधिवक्ता को सुना तथा विचारण न्यायालय के मूल पत्रावली सहित पत्रावली पर उपलब्ध सामग्री का परिशीलन किया, तदोपरांत इस न्यायालय का अभिमत है किः-**

(क) अभियोजन साक्षी सं०2/पीड़िता द्वारा अपने धारा 161 दं०प्र०सं० व 164 दं०प्र०सं० के बयान व मुख्य परीक्षा में अपीलार्थी/अभियुक्त द्वारा उसके दुराचार किये जाने का कथन किया गया है, किंतु जब पुलिस द्वारा कथित पीड़िता का चिकित्सीय परीक्षण कराने हेतु चिकित्सालय ले जाया गया तब पीड़िता के पिता द्वारा पीड़िता का चिकित्सीय परीक्षण कराने से इंकार कर दिया गया है, इसकी परिपुष्टि अभियोजन साक्षी सं०- 4 .डा० अनीता धस्माना के अभिकथन से भी हो रही है। इस प्रकार अभियोजन पक्ष द्वारा घटना की सत्यता की परिपुष्टि के लिए अपनी ओर से प्रयास नहीं किया गया।

(ख) कथित घटना की प्रथम सूचना रिपोर्ट भी विलंबित है। अभियोजन साक्षी सं० 2/ पीड़िता द्वारा अपने मुख्य परीक्षा में कथन किया गया कि "मैं दवा लेने बरौर जा रही थी, रास्ते में मेरे ममेरे भाई कृष्णपाल ने जबरदस्ती मोटर साइकिल पर बैठा लिया।.....जिस खेत में मेरे साथ घटना हुई उसमें धान की फसल लगी थी", जबकि अभियोजन साक्षी सं० 2/पीड़िता की मां द्वारा अपने मुख्य परीक्षा में कथन किया गया कि "यह दोनों मेरी बेटी को दवा दिलाने के बहाने घर से बुलाकर ले गये, लेकिन अस्पताल नहीं ले गये, इन्होंने बड़ा बुरा काम करा।..... गन्ने के खेत में इन लोगों ने मेरी बेटी के साथ बारी-बारी गलत काम किया" इस प्रकार उक्त दोनों अभिकथन में परस्पर विरोधाभाष है।

(ग) कथित पीड़िता के आयु के संबंध में कथित पीड़िता का प्रस्तुत प्रदर्श-7क/शैक्षिक प्रमाण पत्र के संबंध में अभियोजन साक्षी सं० 8/राजकीय प्राथमिक विद्यालय मोतीनगर हल्द्वानी, जिला नैनीताल द्वारा अपने परीक्षण में यह कथन किया गया कि "यह कहना सही है कि प्रवेश के समय जन्मतिथि के संबंध में कोई अन्य शपथ-पत्र या जन्म के संबंध में कोई प्रमाण पत्र नगर निगम, ग्राम पंचायत या प्रधान का मेरे द्वारा नहीं लिया गया था और न ही सोहन लाल द्वारा ही दिया गया था।" एवं न ही उपरोक्त शैक्षणिक प्रमाण को संबंधित सक्षम उच्चाधिकारी द्वारा प्रतिचिन्हित किया गया है, जिससे पीड़िता के वास्तव में नाबालिग होने की परिपुष्टि नहीं हो रही है।

तथ्य यह कि पीड़िता के शरीर पर कोई बाह्य चोट नहीं पाया गया, जबकि उसके द्वारा यह दावा किया गया कि उसके साथ कृषि क्षेत्र/खेत में दुराचार किया गया था। यह एक ऐसा पहलू है, जो अभियोजन पक्ष के संस्करण पर संदेह उत्पन्न करता है।

(घ) कथित घटना में पीड़िता का बरामद/संकलित अंडरवियर, जिसे जांच हेतु प्रयोगशाला प्रेषित किया गया था, विधि विज्ञान प्रयोगशाला, उ०प्र० मुरादाबाद से प्राप्त रिपोर्ट के परिक्षण परिणाम में "वस्तु-

अंडरवियर पर मानव रक्त पाया गया।, वस्तु- अंडरवियर पर शुक्राणु तथा वीर्य नहीं पाया गया" अंकित है, इससे अभियोजन कहानी की परिपुष्टि नहीं हो रही है एवं पीड़िता के साथ दुराचार होने के संबंध में अन्य कोई समर्थनीय चिकित्सीय साक्ष्य उपलब्ध नहीं है।

यहां यह उल्लेखनीय है कि **Sadashiv Ramrao Hadbe Vs. State of Maharastra, 2007 (1) SCC (Cri.) 161** में मा० उच्चतम न्यायालय ने माना है कि अभियोक्ता की एकमात्र गवाही पोषणीय है, यदि यह न्यायालय के विश्वास को प्रेरित करती है, लेकिन यदि अभियोक्ता द्वारा दिया गया संस्करण किसी भी चिकित्सीय साक्ष्य के द्वारा समर्थित नहीं है या पूरे आसपास की परिस्थियां अत्यधिक असंभाव्य है और अभियोक्ता द्वारा स्थापित मामले को झूठा साबित करती हैं, तो न्यायालय अभियोक्ता के एकमात्र साक्ष्य पर कार्यवाही नहीं करेगा। उपयुक्त निर्णय का प्रस्तर सं० -9 इस प्रकार हैः-

**"9. It is true that in a rape case the accused could be convicted on the sole testimony of the prosecutrix, if it is capable of inspiring of confidence in the mind of the court. If the version given by the prosecutrix is unsupported by any medical evidence or the whole surrounding circumstances are highly improbable and belie the case set up by the prosecutrix, the court shall not act on the solitary evidence of the prosecutrix. The courts shall be extremely careful in accepting the sole testimony of the prosecutrix when the entire case is improbable and unlikely to happen."**

(च) यहां विचारणीय तथ्य यह भी है कि धारा-42 पाक्सो अधिनियम में अनुकल्पिक दण्ड का प्रावधान किया गया है, जहाँ भा०दं०वि० तथा पाक्सो अधिनियम के अधीन दोनो अपराध गठित होते हैं, वहाँ तत्समय प्रवत्त किसी विधि में अन्तर्विष्ट किसी बात के होते हुए भी ऐसे अपराध का दोषी पाया गया अपराधी उस दण्ड का भागी होगा, जो इस अधिनियम के अधीन या भारतीय दण्ड संहिता के अधीन अधिक मात्रा में गुरूतर है, उससे दण्डित किया जायेगा। प्रस्तुत मामले में धारा 376डी भा०दं०वि० में कम से कम बीस वर्ष के दण्ड का प्रावधान व आजीवन कारावास तक के दण्ड का प्रावधान है। इसी प्रकार धारा 4 लैंगिक अपराधों से बालकों का संरक्षण अधिनियम 2012 में भी बीस वर्ष से कम की सजा का प्रावधान न होने के साथ-साथ आजीवन कारावास के दण्ड का प्रावधान है, यद्यपि धारा 4 लैंगिक अपराधों से बालकों का संरक्षण अधिनियम 2012 में उक्त दण्ड को सोलह वर्ष से कम उम्र की पीड़िता के साथ हुए बलात्कार से सम्बन्धित होने पर है, जबकि धारा 376डी भारतीय दण्ड संहिता में उम्र का कोई प्रतिबंध नही लगाया गया है।

२१. हमने अभिलेख पर उपलब्ध साक्ष्यों पर विचार किया है, जैसा कि पिछलें

प्रस्तरों में चर्चा की गई है और उभय पक्षों के विद्वान अधिवक्ताओं द्वारा प्रस्तुत तर्कों को सुनने के पश्चात हम पाते हैं कि मामले के तथ्य के साक्षीगण और पीड़िता के बयान चिकित्सीय साक्ष्य से मेल नहीं खाते हैं। साथ ही इस तथ्य को भी शामिल किया गया कि साक्षीगण द्वारा अपराध को देखने के तरीके में विरोधाभास है। इस स्तर पर हम सुविचारित राय के हैं कि अभियोजन पक्ष, अपीलार्थी/अभियुक्तगण के विरुद्ध लगाए गए दुराचार के आरोपों को बखूबी साबित करने में विफल रहा है तथा अपीलार्थी/अभियुक्त संदेह का लाभ पाने का हकदार है। पीड़िता के कथनों में विरोधाभाष के कारण उसे (पीड़िता) को निर्विवाद पीड़िता की संज्ञा नहीं दी जा सकती है। अतः पीड़िता के कथनों के विरोधाभाष एवं अन्य किसी संपुष्टि की अनुलब्धता में अपीलार्थी को सजा दिया जाना उचित न होगा।

२२. तद्नुसार, पत्रावली पर उपलब्ध उपरोक्त संपूर्ण साक्ष्यों पर विचार-विमर्श करने के मद्देनजर, **यह आपराधिक अपील स्वीकार की जाती है** तथा मु०अ०सं० 436/2018, धारा 376डी, 506 भा०दं०वि० व धारा 4 लैंगिक अपराधों से बालकों का संरक्षण अधिनियम 2012, थाना नवाबगंज, जनपद बरेली से उद्भूत फौजदारी वाद सं० 303/2020 (उ०प्र० राज्य बनाम राम किशोर उर्फ रामकिशन) को अपास्त किया जाता है तथा अपीलार्थी/ अभियुक्त को धारा 376डी भा०दं०वि० के अधीन आजीवन कारावास और एक लाख रूपये के अर्थदण्ड व अर्थदण्ड अदा न करने की दशा में छः-छः माह का अतिरिक्त साधारण कारावास एवं धारा 506 (2) भा०दं०वि० के अधीन पांच वर्ष कारावास और सात हजार रूपये के अर्थदण्ड व अर्थदण्ड अदा न करने की दशा में एक माह का अतिरिक्त कारावास के दण्ड के अधीन दण्डित अपराध से **दोषमुक्त** किया जाता है।

२३. अपीलार्थी/अभियुक्त, यदि धारा 437-ए दं०प्र०सं० के अनुपालन के अधीन किसी अन्य मामले में वांछित न हो तो उसे अविलंब कारागार से अवमुक्त कर दिया जाय।

२४. कार्यालय को निर्देशित किया जाता है कि विचारण न्यायालय का अभिलेख वापस भेज दिया जाय तथा इस आदेश की एक प्रतिलिपि संबंधित विचारण न्यायालय को अनुपालन हेतु तुरंत भेजना सुनिश्चित किये जाय।

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**(2024) 11 ILRA 554**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 05.11.2024**

**BEFORE**

**THE HON'BLE ALOK MATHUR, J.**

Writ-A No. 1934 of 2018

**Vijay Bahadur Verma ...Petitioner**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**

Saontosh Kumar Kanaujia, Diwakar Singh Kaushik

**Counsel for the Respondents:**
C.S.C.

**A. Service Law – Compulsory retirement -** The petitioner has been inflicted with censure entry in 2007 and five annual increments were withheld in the 2010 and again in the year 2012, censure entry was awarded in his character roll. The aforesaid entries clearly indicate that there was sufficient material before the screening committee to conclude that the petitioner was a deadwood and accordingly, provision of Regulation 56 of the Financial Hand Book 2 to 4 were clearly applicable in the case of the petitioner. (Para 15)

The screening committee constituted of the Sub Divisional Officer, who was the appointing authority of the petitioner, apart from the Tehsildar, Kanoongo and Revenue Inspector. In the present case, the appointing authority was mandated by the GO dated 26.10.1985 to be a part of the screening committee and accordingly, he had examined the entire service record of the petitioner and was a party to the screening committee. He in his capacity as the appointing authority has issued letter dated 18.10.2019 compulsory retiring the petitioner relying on the report of screening committee. There is no infirmity in the said order, as the Sub Divisional Officer himself was the Presiding Officer of the screening committee and was duly aware of the facts and circumstances of the said report and accordingly, **the argument of learned counsel for petitioner and there was absence of subjective satisfaction is clearly not made out in peculiar facts of the present case.** (Para 14)

**B. There is no doubt even if the government servant is compulsory retired, he is certainly entitled for all service dues for which he is entitled as per rules.** Accordingly, liberty is given to the petitioner to move a fresh representation to respondent no. 3 i.e. Sub Divisional Officer Mitauli, District Lakhimpur Kheri giving all the details of the dues to which he is entitled. (Para 18)

**C. Words and Phrases – *'Quorum'* –** 'Quorum denotes the minimum number of members of any body of persons whose presence is necessary in order to enable that body to transact its business validly so that its acts may be lawful. (Para 9)

**Writ petition dismissed**. (E-4)

**Precedent followed:**

Punjab University, Chandigarh Vs Vijay Singh Lamba & ors., (1976) 3 SCC 334 (Para 9)

**Present petition challenges order dated 18.10.2017, passed by the Sub Divisional Officer/appointing authority, Mitauli, Lakhimpur Kheri, whereby the petitioner has been compulsorily retired from the service.**

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

1. Heard Shri Diwakar Singh Kaushik, learned counsel for petitioner, learned Standing Counsel for the State and perused the material available on record.

2. By means of the present writ petition, the petitioner has challenged the impugned order dated 18.10.2017 passed by the Sub Divisional Officer/appointing authority, Mitauli, Lakhimpur Kheri, whereby the petitioner has been compulsory retired from service.

3. It has been submitted by learned counsel for petitioner that the petitioner was appointed on the post of Lekhpal in the year 1984 in Tehsil Lakhimpur District Kheri and subsequently he was transferred to Tehsil Gola in the year 1988 and in 1994 to Dhaurahara, District Lakhimpur Kheri. It has further been stated that certain disciplinary proceedings were initiated against the petitioner in 2002 whereby on 25.07.2002 he was placed under suspension on the allegation that he had not attended

the work relating to revision of voters list and has not carried out agricultural accounts and he was not present on the Tehsil Day. The inquiry proceedings concluded on 31.03.2003 and a punishment of censure order was passed against the petitioner. Against the order of punishment of censure, the petitioner had preferred a statutory appeal before the District Magistrate, Lakhimpur Kheri, which was also rejected on 30.07.2012 and subsequently a writ petition was also filed before this Court being Writ Petition No. 906 (SS) of 2013, which was allowed on 20.02.2013 and the order of punishment dated 30.07.2012 was quashed and the matter was remanded to the Prescribed Authority for deciding afresh after giving opportunity of hearing to the petitioner. Again in the remand proceedings, fresh order of punishment was passed, against which also an appeal was also rejected, against which the petitioner approached before the U.P. Public Services Tribunal by filing a claim petition, against which fresh order of punishment dated 31.03.2003, which was pending consideration when the decision was taken to compulsory retire the petitioner.

4. It has further been stated that by means of the impugned order, it seems that service record of the petitioner was duly examined by a screening committee, who had made a recommendation to the appointing authority and the appointing authority in turn has concurred with the report of the screening committee and considering the fact that the petitioner has crossed the age of 50 years, he has been compulsory retired after giving three months wages in lieu of notice.

5. The first ground urged by the petitioner in assailing the said order is that a screening committee was constituted contrary to the Government Order dated 26.10.19085. It has been submitted that in the Government Order dated 26.10.1985, it has been provided that in case the appointing authority of the government servant is other than the Governor then the screening committee would constitute (1) of the appointing authority (2) two senior officials nominated by the appointing authority.

6. In the present case, the screening committee consisted of the Sub Divisional Officer, Mitauli-Kheri, Tehsildar, Mitauli-Kheri, Kanoongo Mitauli-Kheri and Revenue Inspector, Aurangabad, accordingly, it is stated that there were four persons in the screening committee rather than three persons as required in the Government Order dated 26.10.1985. The only ground urged by the petitioner is that the screening committee consisted of more persons than is required under the Government Order Dated 26.10.1985.

7. Learned Standing Counsel on the other hand has opposed the said ground. He has submitted that in-fact the minimum number of persons in the screening committee should be three as per Government Order dated 26.10.1985. He has submitted that in the screening committee, which was constituted to consider the case of the petitioner undoubtedly the appointing authority was the Chairman of the said committee and he was accompanied by three other officials in the Tehsil including, Thesildar, Kanoongo and Revenue Inspector.

8. This Court has considered the Government Order dated 26.10.1985 and

finds that the requirement is of minimum three persons and the three persons should at-least including the appointing authority.

9. Hon'ble Supreme Court in the case of ***Punjab University, Chandigarh Vs. Vijay Singh Lamba and others reported in (1976) 3 SCC 334*** has defined "Quorum" as 'Quorum' denotes the minimum number of members of any body of persons whose presence is necessary in order to enable that body to transact its business validly so that its acts may be lawful. Therefore, by the fixation of quorum, only a minimum number of members are prescribed and it does not imply that any member more than the prescribed number may be denied opportunity to participate unless the statute itself provides for the maximum limit of the quorum. Accordingly, the mandatory condition is that the appointing authority should be a part of the screening committee in case the appointing authority of the government servant is other than the Governor and should include the two senior officials. In the present case, the condition as prescribed in the Government Order dated 26.10.1985 are clearly fulfilled, inasmuch as the case of the petitioner was duly considered by the screening committee consisting of four persons. This Court does not find any infirmity in the constitution of the screening committee.

10. Apart from the above, no allegations of the mala-fide have been levelled by the petitioner against member of the screening committee, which may render him disqualified to participate in the screening committee, accordingly, this Court does not find force in the said ground, which is accordingly, rejected.

11. The only other ground, which was urged by the petitioner is that there was no subjective satisfaction of the authority concerned before passing of the order of the compulsory retirement.

12. It was argued by learned counsel for the petitioner that the report has been accepted by the Sub Divisional Officer and no reasons have been spelt out clearly indicating the same has been passed without any application of mind.

13. Learned Standing Counsel on the other hand has submitted that once it is clear that the appointing authority i.e., the Sub Divisional Officer was himself the Presiding Officer of the screening committee and it is the said screening committee which had looked into the previous record of the petitioner before concluding that he was fit case for being compulsory retired, no other reason was required to be given by him while accepting his own report.

14. After hearing rival contentions and perusing the record, this Court has already noticed that the screening committee constituted of the Sub Divisional Officer, who was the appointing authority of the petitioner, apart from the Tehsildar, Kanoongo and Revenue Inspector. In the present case, the appointing authority was mandated by the Government Order dated 26.10.1985 to be a part of screening committee and accordingly, he had examined the entire service record of the petitioner and was a party to the screening committee. He in his capacity as the appointing authority has issued letter dated 18.10.2019 compulsory retiring the petitioner relying on the report of screening committee. Accordingly, we do not find any infirmity in the said order, inasmuch as, the Sub Divisional Officer himself was the Presiding Officer of the screening

committee and was duly aware of the facts and circumstances of the said report and accordingly, the argument of learned counsel for petitioner that there was absence of subjective satisfaction is clearly not made out in the peculiar facts of the present case.

15. Apart from the above, this Court has examined the fact that the petitioner has been inflicted with censure entry in 2007 and five annual increments were withheld in the 2010 and again in the year 2012, censure entry was awarded in his character roll. The aforesaid entries clearly indicate that there was sufficient material before the screening committee to conclude that the petitioner was a deadwood and accordingly, provision of Regulation 56 of the Financial Hand Book 2 to 4 were clearly applicable in the case of the petitioner.

16. In light of the above, no other ground was urged in assailing the impugned order, accordingly, the petition being devoid of merits is hereby dismissed.

17. It has been submitted by learned counsel for petitioner that due to pendency of the present writ petition, even admissible dues of the petitioner of his compulsory retirement has also not been given by the State Government.

18. There is no doubt even if the government servant is compulsory retired, he is certainly entitled for all service dues for which he is entitled as per rules. Accordingly, liberty is given to the petitioner to move a fresh representation to respondent no. 3 i.e. Sub Divisional Officer Mitauli, District Lakhimpur Kheri giving all the details of the dues to which he is entitled. Let the representation be given to the respondent no. 3 within a period of three weeks. In case such a representation is given, the respondent no. 3 shall consider and decide the same by a reasoned and speaking order within six weeks thereafter. In case he finds that the petitioner is entitled to the claims made by him in the said representation, he shall ensure that the same are disbursed to the petitioner with expedition say within a period of one month thereafter.

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**(2024) 11 ILRA 558**
**APPELLATE JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 21.11.2024**

**BEFORE**

**THE HON'BLE MANOJ BAJAJ, J.**

Criminal Appeal (Defective) No. 1431 of 2023

**Chandan Mishra @ Shailesh Mishra ...Appellant**

**Versus**

**State of U.P. & Ors. ...Respondents**

**Counsel for the Appellant:**
A.T. Pandey

**Counsel for the Respondents:**
G.A.

**Criminal Law - Criminal Procedure Code, 1973 - Sections 161, 164, 173(2) & 375, - Indian Penal Code, 1860 - Section 354-A - The Protection of Children from Sexual Offences Act, 2012 - Sections 11 & 12 – Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 - Section 3(1)X -** Appeals – against Conviction and Sentence – written complaint – FIR – offence of Sexual assault and attempt to rape of a minor girl Child – Investigation – Final report u/s 173(2) Cr.P.C. – Cognizance – Summoning Order – Bail Granted – Charges framed – Application to plead guilty – Request for concluding the Trial – conviction – sentencing – Application for release from custody – Dismissed

– on the ground, sentence does not contain concession for concurrent running of Sentences – Appeal filed – Court finds that, ordinarily, Sentences for different offences related to one Incident run concurrently – if not, Trial Court must record reasons for consecutive Sentences – Rigours of Section 375 Cr.P.C. barring Appeal not strictly applicable in instant case – Resultantly, Appeal Partly Allowed – Impugned Judgment of conviction modified, Accordingly (Para – 17, 18, 19)

**Appeal partly allowed.** (E-11)

(Delivered by Hon'ble Manoj Bajaj, J.)

1. Appellant-Chandan Mishra @ Shailesh Mishra has filed this appeal to challenge the judgment of conviction and order of sentence dated 13th July, 2022 passed by Special Judge (P.O.C.S.O. Act), Court No. 1, Gorakhpur in Special Sessions Case No. 32 of 2013, arising out of Case Crime No. 394 of 2013, under Section 354A IPC, Section 11/12 Protection of Children from Sexual Offences Act, 2012 and Section 3(1)X Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, registered at Police Station Shahpur, District Gorakhpur.

2. The facts leading to the above appeal are that upon a written complaint by Dinesh Chaudhary (complainant), the above mentioned FIR was registered with the allegations that on 29.5.2013, Wednesday at 4:30 pm, Chandan Mishra, neighbourer took away his daughter to his house, where he molested her and attempted to commit rape. On hearing the screams of the victim, few persons reached at the place of occurrence, but the accused managed to escape. As per complainant, the occurrence was witnessed by Rajesh Chaudhary, Vishal and others. Broadly on these allegations, the above noticed case crime was registered.

3. After registration of the case, the investigation was carried out and the statements of the victim and eye-witnesses were recorded and the site plan of the place of occurrence was also prepared. Finally, upon completion of investigation, a final report under Section 173(2) Cr.P.C. was filed in the court of competent jurisdiction, thereby sending the accused-appellant to face trial for alleged commission of offences punishable under Section 354A IPC, Section 11/12 Protection of Children from Sexual Offences Act, 2012 and Section 3(1)X Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

4. The trial court analyzed the final report on 26.6.2019 and took cognizance of the offences, and summoned the accused. Pursuant to the said order, the accused-appellant appeared, who was released on bail vide order dated 30th July, 2015. Thereafter, the trial court framed charges against the accused for alleged commission of offences punishable under Section 354A IPC, Section 11/12 Protection of Children from Sexual Offences Act, 2012 and Section 3(1)X Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, but the accused pleaded not guilty and chose to face trial.

5. The prosecution examined its two witnesses PW-1 Dinesh Chaudhary and PW-2 mother of the victim, however, during the pendency of the trial, the accused-appellant moved an application on 28th June, 2022 to plead guilty in respect of the alleged offences and prayed for concluding the trial.

6. The trial court vide impugned judgment dated 13th July, 2022 proceeded to convict him and imposed sentence of

two years rigorous imprisonment for commission of offence punishable under Section 354A IPC with a fine of Rs. 5000/-, and in default further ordered him to undergo simple imprisonment for six months. Similarly, for offence under Section 11/12 Protection of Children from Sexual Offences Act, 2012, the convict was awarded a sentence of two years rigorous imprisonment with a fine of Rs. 3000/-, and in default, he was ordered to undergo further simple imprisonment for three months, whereas in respect of offence punishable under Section 3(1)X Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 rigorous imprisonment for a period of one year was awarded with a fine of Rs. 2000/-, and in default, the convict was ordered to undergo three months simple imprisonment.

7. Later on, an application was moved by the appellant-convict in August, 2023 before the trial court, who prayed for his release from custody as the period of imprisonment awarded vide judgment dated 13th July, 2022 stood served. However, the said application was dismissed by the trial court vide order dated 30.8.2023 on the ground that the impugned order of sentence does not contain the concession that the sentences awarded to the convict shall run concurrently, and the total sentence(s) awarded to the convict would run consecutively and shall be completed by July, 2026.

8. Feeling aggrieved against the said decision dated 30th August, 2023, the appellant has preferred this appeal to challenge the impugned judgment of conviction as well as the order of sentence dated 13th July, 2022.

9. Alongwith the appeal, a separate application seeking condonation of delay of 460 days in filing the appeal has also been moved, wherein vide order dated 26.2.2024, notice was issued to the opposite party nos. 2 and 4. As per office report dated 20th July, 2024, the opposite party no. 2 had refused to accept notice.

10. Learned counsel for the appellant has argued that the alleged occurrence took place in the year 2013 and after commencement of trial, the accused-appellant participated in the said proceedings, who during the pendency of the trial pleaded guilty and considering the stand of the accused, the trial court had convicted him vide judgment dated 13th July, 2022. Learned counsel has further referred to the impugned judgment of conviction and order of sentence to contend that while sentencing the convict for commission of different offences, the respective period of imprisonment awarded was not ordered to run concurrently, therefore, the convict having undergone more period of imprisonment, than awarded, is still languishing in jail.

11. Learned counsel further argued that the order dated 30.8.2023 also suffers from illegality, as the trial court has failed to appreciate the background of the case while refusing to modify the sentence part, therefore, the appellant has approached this Court through the above statutory appeal, which is beyond the period of limitation. Learned counsel submits that since the appellant had been pursuing his alternative remedy, therefore, delay in filing the appeal be condoned and the sentence awarded by the trial court vide order dated 13.7.2022 be modified.

12. In response, learned State Counsel has argued that once the judgment of conviction is founded upon the confession of the accused, therefore, it is amply clear that the accused was well aware of the consequences of his confession. According to the learned State Counsel, the convict cannot maintain this appeal, much less to challenge the sentence part alone. Learned State Counsel has further drawn the attention of the Court to the order dated 30th August, 2023 and argued that the trial court has clearly observed that the total sentence imposed upon the convict is five years alongwith fine, and in default, he has been further directed to undergo a period of twelve months simple imprisonment. Thus, it cannot be said that the sentence awarded to the convict stands served by him. Learned State Counsel prays that the appeal be dismissed as the appellant has also failed to give a justifiable explanation for filing the appeal after a long delay of 460 days.

13. Learned counsel for the parties have been heard and with their assistance, the case file has been perused.

14. No doubt, the appellant-convict during the trial proceedings had moved an application to plead guilty and consequently, he was convicted by the trial court for commission of the above noticed offences. But, a perusal of the judgment of conviction dated 13th July, 2022 reveals that the trial court had noticed the conduct of the accused, who pleaded guilty, and further calculated his undergone period of two years in custody as an under trial, and clearly decided to punish him with a sentence of imprisonment of already undergone period. In addition, learned trial court chose to burden him with fine also, but erroneously in the sentence part, while imposing the substantive sentence of two years and one year for different offences, the trial court omitted to direct that the sentences awarded to the accused-convict shall run concurrently.

15. Though the accused had later on moved an application seeking modification, but the same was also dismissed. Therefore, keeping in view the above background, this Court does not find any merit in the objection raised by the learned State Counsel that the appellant has failed to explain the delay in filing the appeal. In the considered opinion of this Court, the delay in filing the appeal has been sufficiently explained. Therefore, the same is hereby condoned. Accordingly, the application is allowed.

16. During the course of hearing, the custody certificate dated 29th February, 2024 issued by the Senior Superintendent, District Jail, Gorakhpur has also been produced, and according to it, upto 28th February, 2024, the convict had undergone actual period of one year, eight months and seventeen days in custody, therefore, by now, the convict has undergone a period of approximately two and half years.

17. Ordinarily, the sentences awarded to the convict in respect of commission of different offences are directed to run concurrently, if, the said offences relate to one incident/transaction, but while refusing to exercise such a discretion in favour of the convict, the trial court is required to record reasons for imposing consecutive sentences. The impugned order dated 13th July, 2022 does not contain any such reason, whereas on the contrary, there is a specific observation by the trial court that the accused deserves to be punished only with the period already

undergone by him in prison. Thus, in this background, the rigours of Section 375 Cr.P.C. barring appeal in cases where accused pleads guilty would not be strictly applicable, as the impugned judgment of conviction and order of sentence dated 13th July, 2022 contain conflicting findings relating to the sentence part.

18. As a result, the objection raised by the learned State Counsel regarding maintainability of the appeal is also hereby rejected. In view of the above discussion, this Court has no hesitation in holding that the impugned sentence part contained in the judgment dated 13.7.2022 suffers from grave illegality and calls for interference by this Court in exercise of appellate jurisdiction.

19. Resultantly, the appeal is **party allowed** and while maintaining the judgment of conviction dated 13th July, 2022, the impugned order on sentence is modified to the extent that all the sentences imposed upon the appellant-convict for commission of offences punishable under Section 354A IPC, Section 11/12 Protection of Children from Sexual Offences Act, 2012 and Section 3(1)X Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 shall run concurrently.

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**(2024) 11 ILRA 562**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 13.11.2024**

**BEFORE**

**THE HON'BLE SHEKHAR B. SARAF, J.**
**THE HON'BLE VIPIN CHANDRA DIXIT, J.**

Writ -C No. 8197 of 2024

**Manoj Kumar Sharma ...Petitioner**

**Versus**

**U.O.I. & Anr. ...Respondents**

**Counsel for the Petitioner:**
Ram Lal Mishra

**Counsel for the Respondents:**
A.S.G.I., Anadi Krishna Narayana, Harish Kumar Yadav, Ishan Shishu, Sandeep Kumar Singh

**A. Banking Law – Succession – Banking Regulation Act, 1949 - Section 45ZA - Section 45-ZA(2) merely puts the nominee in the shoes of the depositor after his death and clothes him with the exclusive right to receive the money lying in the account. It gives him all the rights of the depositor so far as the depositor's account is concerned. But it by no stretch of imagination makes the nominee the owner of the money lying in the account.** The Banking Regulation Act is enacted to consolidate and amend the law relating to banking. It is in no way concerned with the question of succession. All the monies receivable by the nominee by virtue of S. 45-ZA(2) would, therefore, form part of the estate of the deceased depositor and devolve according to the rule of succession to which the depositor may be governed. (Para 8)

The petitioner's main argument is that the petitioner being the nominee, the petitioner is entitled to receive the money in the FDRs as per Section 45ZA. (Para 5)

The petitioner has a right to obtain the money from the bank as he is a nominee. However, this money which is received by the petitioner would be subject to the succession laws and the heirs of the deceased would have a right to the said amount in accordance with law. (Para 11)

**Writ petition disposed of.** (E-4)

**Precedent followed:**

Ram Chander Talwar & anr. Vs Devender Kumar Talwar & ors., (2010) 10 SCC 671 (Para 8)

(Delivered by Hon'ble Shekhar B. Saraf, J. & Hon'ble Vipin Chandra Dixit, J.)

**In Re: Civil Misc. Impleadment Application.**

1. Impleadment application is allowed.

2. Let the necessary impleadment be incorporated in the memo of writ petition forthwith.

**Writ Petition**

1. Heard learned counsel for the parties and perused the record.

2. The present writ petition has been filed seeking the following reliefs:-

*"(I) Issue a Writ, order or direction in the nature of Mandamus directing and commanding the respondent No.2 to release the FDR Account No. 25660300006755, 25660300006754, 25660300015398 and 25660300006756 in favour of petitioner as being a nominee and a legal heir.*

*(II) To, issue any other writ order or direction which this Hon'ble Court may deem just and proper and the circumstances of the case.*

*(III) Award the cost of the petition in favour of the petitioner."*

3. The brief facts of the case are that the mother of the petitioner died on February 8, 2020. Before the death of the mother of the petitioner, the mother of the petitioner was owner of several properties as well as owner of several FDRs at the Bank of Baroda. In all these FDRs the petitioner has been named as a nominee.

4. It is to be noted that the petitioner had also filed succession suit being Civil Suit No.195 of 2020 before the learned Civil Judge (Senior Division)/F.T.C., Moradabad. However, this suit was dismissed on the ground that there was another suit pending for cancellation of the alleged will of the petitioner's mother.

5. The petitioner's main argument is that the petitioner being the nominee, the petitioner is entitled to receive the money in the FDRs as per Section 45ZA of the Banking Regulation Act, 1949 (hereinafter referred to as the 'Act'). The said section is delineated below:-

**"45ZA. Nomination for payment of depositors' money.?**

*(1) Where a deposit is held by a banking company to the credit of one or more persons, the depositor or, as the case may be, all the depositors together, may nominate, in the prescribed manner, one person to whom in the event of the death of the sole depositor or the death of all the depositors, the amount of deposit may be returned by the banking company.*

*(2) Notwithstanding anything contained in any other law for the time being in force or in any disposition, whether testamentary or otherwise, in respect of such deposit, where a nomination made in the prescribed manner purports to confer on any person the right to receive the amount of deposit from the banking*

*company, the nominee shall, on the death of the sole depositor or, as the case may be, on the death of all the depositors, become entitled to all the rights of the sole depositor or, as the case may be, of the depositors, in relation to such deposit to the exclusion of all other persons, unless the nomination is varied or cancelled in the prescribed manner.*

*(3) Where the nominee is a minor, it shall be lawful for the depositor making the nomination to appoint in the prescribed manner any person to receive the amount of deposit in the event of his death during the minority of the nominee.*

*(4) Payment by a banking company in accordance with the provisions of this section shall constitute a full discharge to the banking company of its liability in respect of the deposit: Provided that nothing contained in this sub-section shall effect the right or claim which any person may have against the person to whom any payment is made under this section."*

6. The petitioner further relies on the Circular letter No.RB12004-05/490 09.06.2005. Paragraph 2 of the said Circular is provided below:-

***"2. ACCESS TO BALANCE IN DEPOSIT ACCOUNTS***

***(A) Accounts with survivor/nominee clause***

*2.1 As you are aware, in the case of deposit accounts where the depositor had utilized the nomination facility and made a valid nomination or where the account was opened with the survivorship clause ("either or survivor", or "anyone or survivor", or "former or survivor" or "latter or survivor"), the payment of the balance in the deposit account to the survivor(s)/nominee of a deceased deposit account holder represents a valid discharge of the bank's liability provided:*

*(a) the bank has exercised due care and caution in establishing the identity of the survivor(s) / nominee and the fact of death of the account holder, through appropriate documentary evidence;*

*(b) there is no order from the competent court restraining the bank from making the payment from the account of the deceased; and*

*(c) it has been made clear to the survivor(s) / nominee that he would be receiving the payment from the bank as a trustee of the legal heirs of the deceased depositor, i.e., such payment to him shall not affect the right or claim which any person may have against the survivor(s) / nominee to whom the payment is made.*

*2.2 It may be noted that since payment made to the survivor(s) / nominee, subject to the foregoing conditions, would constitute a full discharge of the bank's liability, insistence on production of legal representation is superfluous and unwarranted and only serves to cause entirely avoidable inconvenience to the survivor(s) / nominee and would,*

*therefore, invite serious supervisory disapproval. In such case, therefore, while making payment to the survivor(s) / nominee of the deceased depositor, the banks are advised to desist from insisting on production of succession certificate, letter of administration or probate, etc., or obtain any bond of indemnity or surety from the survivor(s)/nominee, irrespective of the amount standing to the credit of the deceased account holder."*

7. The petitioner argues that aforesaid Circular is having binding effect by virtue of provisions of Section 35A. The Section 35A is provided herein below:-

***"[35A. Power of the Reserve Bank to give directions**.- (1) Where the Reserve Bank is satisfied that-*

*(a) in the [public interest]; or*

*[(aa) in the interest of banking policy; or]*

*(b) to prevent the affairs of any banking company being conducted in a manner detrimental to the interests of the depositors or in a manner prejudicial to the interests of the banking company; or*

*(c) to secure the proper management of any banking company generally,*

*it is necessary to issue directions to banking companies generally or to any banking company in particular, it may, from time to time, issue such directions as it deems fit, and the banking companies or the banking company, as the case may be, shall be bound to comply with such directions.*

*(2) The Reserve Bank may, on representation made to it or on its own motion, modify or cancel any direction issued under sub-section (1), and in so modifying or cancelling any direction may impose such conditions as it thinks fit, subject to which the modification or cancellation shall have effect.]"*

8. The petitioner further relies on the judgment of a co-ordinate Bench in Cdr. Vineet Kumar Sharma Vs. Union of India and 3 others (Neutral Citation No.- 2024:AHC:12018-DB), wherein the co-ordinate Bench had considered the judgment of Supreme Court in ***Ram Chander Talwar and another Vs. Devender Kumar Talwar and others, (2010) 10 SCC 671***, wherein the Supreme Court had held as follows:-

*"Section 45-ZA(2) merely puts the nominee in the shoes of the depositor after his death and clothes him with the exclusive right to receive the money lying in the account. It gives him all the rights of the depositor so far as the depositor's account is concerned. But it by no stretch of imagination makes the nominee the owner of the money lying in the account. It needs to be remembered that the Banking Regulation Act is enacted to consolidate and amend the law relating to banking. It is in no way concerned with the question of succession. All the monies receivable by the nominee by virtue of Section 45-ZA(2) would, therefore, form part of the estate of*

*the deceased depositor and devolve according to the rule of succession to which the depositor may be governed."*

9. The co-ordinate Bench had categorically held as follows:-

*"16. In any case, Section 45-ZA of the Act introduced by Act No. 1 of 1984 w.e.f. 29.03.1985 leaves no matter of doubt, in the above regard. As correctly submitted by learned counsel for the petitioner, by virtue of Section 45-ZA (2) of the Act, the nominee alone remains entitled to receive the money from the bank notwithstanding any disposition whether testamentary or otherwise. The right to receive the money from the Bank is distinct and different from the right to succeed to that money. Seen in that light, the petitioner has a perfect right to receive the money from the Bank, at present.*

*17. It is to enforce that provision of law that the Reserve Bank of India has issued the Circular instruction dated 09.06.2005 (noticed above). Those instructions appear to have been issued in public interest to ensure that the new law (Section 45-ZA), is given full effect by the Banking Companies. Section 35-A (1) of the Act leaves no matter of doubt that those directions issued by Reserve Bank of India are mandatory in nature and the respondent bank is duty bound to follow the same.*

*18. Insofar as the other TDRs are concerned where the petitioner is the surviving depositor, his rights may be better. However, no final conclusion has been drawn at this stage as the issue of succession is pending before the court of competent jurisdiction. At the same time, by virtue of the instruction given to the respondent bank by Col. Satish Kumar Sharma during his life time, the respondent bank would remain obligated to hand over that money also to the present petitioner.*

*19. Let the money deposited against the FDR Nos. 0328833439, 50375954027, 50375954210 and 50470840305, five other FDRs bearing FDR Nos. 50532431644, 50532431521, 50532431349, 50532431203 and 50532430833 and savings bank account No. 20290126475 be released in favour of the petitioner forthwith with the rider that the petitioner would remain liable to account for the same in accordance with law."*

10. Per contra counsel appearing on behalf of private respondents and the State submit that Section 45ZA of the Banking Regulation Act cannot over rule the laws of succession and, therefore, even if the money is required to be given to the petitioner, the same would have to be held by the petitioner in trust for the legal heirs of the deceased.

11. Upon analysis of the catena of Supreme Court judgments and the judgment delivered by the co-ordinate Bench, we are of the view that it is patently clear that the petitioner has a right to obtain the money from the bank as he is a nominee. However, we are of the view that this money which is received by the

petitioner would be subject to the succession laws and the heirs of the deceased would have a right to the said amount in accordance with law.

12. Counsel on behalf of petitioner has given an undertaking before this Court that he shall hold the money in trust and shall be liable to make payment to the legal heirs if and when decided by the courts of law in accordance with law. In light of the same, the Bank of Baroda is directed to release the amounts lying in FDRs in favour of petitioner within a period of three weeks from date. The petitioner is directed to file an affidavit before Bank of Baroda that money being received by him is being held by him in trust and undertakes to make payment of the same to the legal heirs as and when decided.

13. With the above direction the writ petition is disposed of.

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**(2024) 11 ILRA 567**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 23.11.2024**

**BEFORE**

**THE HON'BLE SHEKHAR B. SARAF, J.**
**THE HON'BLE KSHITIJ SHAILENDRA, J.**

Writ -C No. 21949 of 2024

**Amita Tripathi ...Petitioner**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Sri Somesh Khare

**Counsel for the Respondents:**
Sri Ajal Krishna, C.S.C.

**Civil Law – Constitution of India,1950 – Article 226** - Writ Petition – Challenge to the Impugned orders to the effect that despite culmination of inquiries, one after another, in favour of the petitioner, the respondent-officers are bent upon to hold *de novo* inquiry – Non-compliance with Court Orders – Respondent No. 5 failed to comply with the Court's directive to file a personal affidavit, leading to his personal appearance - Violation of Interim Stay – Abuse of Process – Despite the Court's interim stay order dated 08.08.2024, a fresh inquiry was initiated - Respondent No. 5 submitted a personal affidavit - misuse of authority – abuse of Process and Influence - Court finds that - respondent No. 5 has acted above the law, disregarded judicial orders, and engaged in malpractice and has attempted to shield his actions by shifting blame on to the Chief Standing Counsel, making it clear that adverse inference must be drawn - Disciplinary Action ordered – held, malpractices and reprehensible conduct cannot be tolerated and respondent No. 5 accountable for violating judicial orders and engaging in malpractice – thus, the St. Government is directed to initiate disciplinary proceedings against the officer and to make interim arrangements for the functioning of his post – further, present matter is directed to be list among the top ten cases – Standing counsel shall place the action taken by the St. Govt. - the Registrar (Compliance), High Court, Allahabad, is directed to send a copy of the order to the Chief Secretary, U.P., for immediate action – writ petition pending. (Para – 10, 11, 12, 14, 15)

**Writ Petition pending.** (E-11)

(Delivered by Hon'ble Shekhar B. Saraf, J. & Hon'ble Kshitij Shailendra, J.)

1. Earlier, when the order dated 11.11.2024 directing the respondent No.5 to file his personal affidavit was not complied with, this Court, by order dated 21.11.2024, directed personal appearance of the officer concerned explaining the reason of initiation of another inquiry despite stay of third de novo investigation.

2. Today, personal affidavit of Shri N.B. Savita, presently posted as Joint Development Commissioner, Kanpur Division, Kanpur has been filed in Court which is taken on record. The said officer is also personally present before us.

3. The grievance raised by means of this writ petition is to the effect that despite culmination of inquiries, one after another, in favour of the petitioner, the respondent-officers are bent upon to hold de novo inquiry which is an abuse of the process of law. Considering the material on record and the arguments advanced, this Court passed following order on 08.08.2024:-

> "Learned counsel appearing on behalf of the petitioner seeks and is granted permission to carry out necessary corrections in the writ petition including the prayer clause.
>
> Issue notice to respondent Nos.6 and 7.
>
> Steps be taken within a week.
>
> List this matter on September 2, 2024 as fresh, by which date learned Standing Counsel may get instructions in the matter.
>
> In the meantime, Joint Development Commissioner, Kanpur Region, Kanpur is directed to stay his hands with regard to third de novo investigation. "

4. On 11.11.2024, the Court was informed about initiation of another inquiry in violation of interim order passed on 08.08.2024. Consequently, the respondent No.5 i.e. Joint Development Commissioner, Kanpur Division, Kanpur, was directed to file his personal affidavit. In the personal affidavit, a stand has been taken substantially to the effect that the inquiries conducted earlier were initiated on the complaint of one Dalveer Singh which were distinct in nature and unrelated to the instant writ petition whereas the action taken now is pursuant to two fresh independent complaints submitted by Smt. Anupam Pal and Dalveer Singh. The Court may note that, in sum and substance, the allegations levelled against the petitioner are in respect of alleged financial irregularities committed qua construction/ development of some cattle shelter shed and the inquiries held earlier were also in respect of same allegations but had ended in favour of the petitioner having found no irregularities on her part.

5. As far as reason behind going ahead with the fresh inquiry despite interim order dated 08.08.2024 operating in the instant writ petition, a copy of the letter dated 13.09.2024 annexed as 'Annexure No.SA-3' to the supplementary affidavit was referred to during the course of arguments. The letter reads as under:-

> "प्रेषक,
>
> **संयुक्त विकास आयुक्त,**
> कानपुर मण्डल, कानपुर।
>
> सेवा में,
>
> **अधीक्षण अभियन्ता,**
> ग्रामीण अभियन्त्रण विभाग
> कानपुर मण्डल कानपुर।
>
> संख्या – एस०टी०/ जांच ग्रा० प० – चपुन्ना / मनरेगा / 2024 – 25 दिनांक 13.09.2024
>
> विषय- जनपद कन्नौज के विकास खण्ड हसेरन की ग्राम पंचायत चपुन्ना में कैटल शेड / पशु आश्रय स्थल का निर्माण कार्य कराये बिना अनियमित

तरीके से मनरेगा मद की धनराशि का दुरूपयोग किये जाने की शिकायत की जांच कराए जाने के संबंध में।

महोदय,

कृपया, उपर्युक्त श्री दलवीर सिंह पुत्र श्री प्रकाश चन्द्र निवासी ग्राम व पोस्ट चपुन्ना विकास खण्ड हसेरन थाना सौरिख के रजिस्टर्ड प्रार्थना पत्र संख्या – EU226966167IN दिनांक 03.09.2024 (संलग्न) का सन्दर्भ ग्रहण करने का कष्ट करें जिसके माध्यम से शिकायतकर्ता द्वारा अधोहस्ताक्षरी के प्रेषित पत्र संख्या – 451/ एस०टी०/ जॉच ग्रां० पं० – चपुन्ना / मनरेगा /2024 – 25 दिनांक 23.08.2024 द्वारा मा० उच्च न्यायालय, इलाहाबाद में योजित संख्या – 21949 / 2024 अमिता उर्फ नेहा त्रिपाठी बनाम प्रमुख सचिव, ग्राम्य विकास, उ०प्र० लखनऊ आदि 06 पारित आदेश दिनांक 08 – 08 – 2024 के अनुपालन में याचिका का निस्तारण न होने तक अग्रिम कार्यवाही न किये जाने दिए गए निर्देश के क्रम अवगत कराया गया है कि मा० उच्च न्यायालय इलाहाबाद में योजित रिट संख्या – 21940 / 2024 से मामला इतर होने के कारण जांच किए जाने की मांग की गयी है।

प्रकरण में मा० उच्च न्यायालय इलाहाबाद में योजित याचिका संख्या – सी०एम०डब्लू० पी० (सी० – 21949/2024 ) अमिता त्रिपाठी / नेहा त्रिपाठी बनाम उ० प्र० राज्य व अन्य में **मुख्य स्थायी अधिवक्ता के पत्र दिनांक 29- 8-2024 (संलग्न) से स्पष्ट होता है कि आई०जी०आर० एस० सन्दर्भ संख्या – 80016024000589 में ही जॉच न कराये जाने के निर्देश दिये गए हैं।**

अतः श्रीमती अनुपम पाल पत्नी श्री उदयपाल सिंह निवासी ग्राम व पोस्ट चपुन्ना विकास खण्ड हसेरन जनपद कन्नौज एवं श्री दलवीर सिंह पुत्र श्री प्रकाशचन्द्र पाल निवासी ग्राम व पोस्ट चपुन्ना तहसील तिर्वा जनपद कन्नौज के कार्यालय पत्र संख्या 424 / शिकायती पत्र दिनांक 09-08-2024 (संलग्न) द्वारा प्रेषित शिकायती प्रार्थना पत्रों में उठाये गये बिन्दुओ पर गुण दोष के आधार **पर जॉच कर जॉच आख्या यशाशीघ्र उपलब्ध कराने का कष्ट करें।**

**संलग्नक – उपरोक्तानुसार। भवदीय**

(एन०बी०सविता)
संयुक्त विकास आयुक्त
कानपुर मण्डल कानपुर।

**संख्या एवं दिनांक उपरोक्तानुसार।**

प्रतिलिपि – शिकायतकर्ता (1) श्रीमती अनुपम पाल पत्नी श्री उदयपाल सिंह निवासी ग्राम व पोस्ट चपुन्ना विकास खण्ड हसेरन जनपद कन्नौज। (2) श्री दलवीर सिंह पुत्र श्री प्रकाशचन्द्र पाल निवासी ग्राम व पोस्ट चपुन्ना तहसील, तिर्वा जनपद कन्नौज। (3) श्री अमिता उर्फ नेहा त्रिपाठी ग्राम व पोस्ट चपुन्ना विकास खण्ड हसेरन जनपद कन्नौज का सुचनार्थ।

संयुक्त विकास आयुक्त,
कानपुर मण्डल, कानपुर। "

6. A bare perusal of the aforesaid letter would show that despite having full knowledge of the interim order dated 08.08.2024, Shri N.B. Savita, the officer who is present in Court, directed the Superintending Engineer (Rural), Engineering Department, Kanpur Division, Kanpur to hold another inquiry by interpreting the communication made by Chief Standing Counsel of this Court vide his letter dated 29.08.2024 that directions have been issued not to conduct inquiry in relation to IGRS reference No.80016024000589 only. Though the letter of Chief Standing Counsel dated 29.08.2024 was shown to be annexed to the officer's letter dated 13.09.2024, its copy has not been placed before this Court nor has been annexed to the officer's personal affidavit filed by the officer today. Under such circumstances, the Court has all reason to believe that the officer is trying to shield his action of violating the interim order passed by this Court by taking aid of letter written by Chief Standing Counsel without bringing the same on record. This is a clear case where adverse inference must be drawn against the officer for not placing the relevant document before the Court.

7. Apart from the above, the stand taken in the personal affidavit as regards the distinct nature of complaints, the Court may notice that action impugned in the present writ petition is in pursuance of complaint moved by Smt. Anupam Pal (respondent No.6), wife of Uday Pal Singh (respondent No.7). The respondent No.7 is admittedly posted as Sub Inspector, Jalaun which is apparent from an endorsement made at the top of the complaint moved by respondent No.6 before the Commissioner. The endorsement reads as under:-

> "CDO
>
> Mr. Uday Pal Singh , who is a Sub Inspector posted in Jalaun raised very serious allegation. So pls send ADO on sight to verify if the complaint is right or wrong." (It appears that the word "sight" is wrongly mentioned. The correct word is "site").

8. The statement contained in the personal affidavit filed today to the effect that earlier action was taken pursuant to a complaint moved by Dalveer Singh, not party to the writ petition and further, the same was in relation to some irregularities committed by the petitioner in the year 2019-2020, having no concern with the allegations levelled now. This Court has perused the 'Annexure No.3', annexed to the personal affidavit which refers to not only financial year 2019-2020 but also financial year 2020-2021, inquiries initiated and culminated thereafter including the inquiry report dated 08.03.2024. This Court has also examined the fact that respondent No.6, i.e. the complainant, is none other than sister-in-law (Bhabhi) of Dalveer Singh as is mentioned in the complaint filed by Dalveer Singh himself.

9. In view of the above, it is apparently clear that Shri N.B. Savita, presently posted as Joint Development Commissioner, Kanpur Division, Kanpur is treating himself to be not only above the law but also as an appellate authority sitting over the stay order passed by this Court. He has not only clearly violated the interim order dated 08.08.2024 but, even thereafter, did not file his personal affidavit pursuant to order dated 11.11.2024 and has appeared today only when the Court directed his personal appearance. The audacity of the officer goes to the extent that in order to shield his action of going ahead despite an interim order being operative, he has attempted to put the blame squarely upon the Chief Standing Counsel of this Court who takes care of the interest of the State and its machinery in all proceedings before this Court. The attempt is to somehow impress this Court as if it was the Chief Standing Counsel who directly/ indirectly/ expressly/ impliedly directed the officer to go ahead with the inquiry though the facts are absolutely contrary to the same.

10. Though 'Annexure No.7' to the personal affidavit is a copy of letter dated 21.11.2024 written by Shri N.B. Savita to the Superintending Engineer cancelling the earlier letter dated 13.09.2024 with immediate effect with a further direction that no inquiry be conducted, this Court is of the view that it is merely an eye-wash and a device to show that this Court's order has now been complied with. However, it is patently clear that this has been done by the officer because of the order dated 21.11.2024 directing his personal appearance.

11. The overall conduct of the officer leaves no room for doubt that he has abused his position and was dancing to the

tune played by the respondent No.7, a Sub-Inspector and treating himself to be above the law with a further attempt to bring the Chief Standing Counsel into hot waters. Such malpractices and reprehensible conduct cannot be tolerated by this Court.

12. **In view of the above, this Court deems it appropriate to direct the State Government to initiate disciplinary proceedings against Shri N.B. Savita, presently posted as Joint Development Commissioner, Kanpur Division, Kanpur. The State Government shall be at liberty to make interim arrangements for the functional discharge of duties concerning the post of Joint Development Commissioner, Kanpur Division, Kanpur.**

13. **List this petition in top ten cases before appropriate Bench on 16.01.2025.**

14. On the next date fixed, the learned Standing Counsel shall place before this Court the action taken by the State Government pursuant to and in furtherance of this order.

15. Registrar (Compliance), High Court, Allahabad is directed to send a copy of this order to the Chief Secretary (U.P. Government, Lucknow) for immediate action in compliance of this order.

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**(2024) 11 ILRA 571**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 05.11.2024**

**BEFORE**

**THE HON'BLE SALIL KUMAR RAI, J.**

Writ -A No. 5709 of 2019

**Ashish Kumar Rajbhar ...Petitioner**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Sanjay Goswami, Shreyas Srivastava, Sudhanshu Kumar

**Counsel for the Respondents:**
Chandan Kumar, Swapnil Kumar

**A. Service Law – Non-disclosure of criminal case – Appointment/Recruitment - Suppression of "material" information presupposes that what is suppressed that "matters" not every technical or trivial matter.** The employer has to act on due consideration of rules/instructions, if any, in exercise of powers in order to cancel candidature or for terminating the services of employee. Though a person who has suppressed the material information cannot claim unfettered right for appointment or continuity in service but he has a right not to be dealt with arbitrarily and exercise of power has to be in reasonable manner with objectivity having due regard to facts of cases. (Para 8)

**B. Broad-brushing every non-disclosure as a disqualification, would be unjust and the same would tantamount to being completely oblivious to the ground realities.** (Para 9)

Nature of the criminal case; the overall consideration of the judgement of acquittal; the nature of the query in the application/verification form; the contents of the character verification reports; the socio economic strata of the individual applying; the other antecedents of the candidate; the nature of consideration and the contents of the cancellation/termination order' were some of the crucial aspects which should enter the judicial verdict in adjudging the suitability and in determining the nature of relief to be ordered. (Para 9)

Broad- brushing every non-disclosure as a disqualification would be unjust and it would be arbitrary and unreasonable to disqualify a

candidate merely because of non-disclosure of a criminal case which was trivial in nature and related to a petty offence which if disclosed would not have rendered him unfit for post in question. Consequently, any statute/rules/instructions which empowers the employer to deny appointment to a candidate only because of non-disclosure of criminal cases would also be unjust and unreasonable and any decision by the employer denying appointment only because of such non-disclosure would also be contrary to the constitutional principle of fairness and non- arbitrariness in administrative actions. (Para 17)

**C. A conviction need not of itself involve the refusal of a certificate of good character. The circumstances of the conviction should be taken into account.** (Para 14)

Mere conviction need not be regarded as disqualification. The entire circumstances in which his conviction was recorded as well as the circumstances in which he is now placed should be taken into consideration. If he has completely reformed himself on attaining the age of understanding and discretion, mere conviction in childhood should not operate as a bar to his entering Government service). (Para 14)

**D. Verification of character and antecedents of a candidate is required to adjudge the suitability of the candidate for appointment.** (Para 15, 17)

In his impugned order dated 04.03.2019, the Superintendent of Police, relying on Clause 8 (Ja) of the Office Instructions dated 22.5.2018, has mechanically rejected the claim of the petitioner only on the ground of non-disclosure of the criminal case by the petitioner. While rejecting the claim of the petitioner, the SP has not considered the report of the District Magistrate which recommended the petitioner fit for appointment. While deciding the claim of the petitioner, the appointing authority has **neither considered the nature of alleged suppression nor the nature of the case registered against the petitioner** and has **also not considered the fact that the petitioner was not even put on trial in the case. The socio-economic status of the petitioner has also not been considered by the Superintendent of Police and there is no consideration regarding the suitability of the petitioner for appointment.** (Para 18)

**E. Normally in cases where an authority has wrongly exercised its discretion while passing an order, the matter, after quashing the order is remitted back to the authority concerned to pass fresh orders. In the present case, no useful purpose would be served to remit back the matter to the Superintendent of Police, Ballia for a fresh decision.** The petitioner has been disqualified and has been refused appointment letter only on the ground of non-disclosure of a criminal case registered against him. In view of the reasons, **mere non- disclosure of the criminal case could not be fatal for the appointment of the petitioner.** Further, the matter is pending in this Court since 2019 and the petitioner was selected in the selections held in pursuance to the notification issued in 2015. (Para 19)

**F. In a case of deliberate suppression of fact with respect to multiple pending cases such false information by itself will assume significance and an employer may pass appropriate order cancelling candidature or terminating services as appointment of a person against whom multiple criminal cases were pending may not be proper.** (Para 8)

In the present case are that only one criminal case had been registered against the petitioner. It is not the case of the St. respondents that multiple criminal cases were registered against the petitioner. The case was registered u/Ss 147/323/452/325 of the IPC r/w Section 3(1)(x) Schedule Castes and Schedule Tribes (Prevention of Atrocities) Act, 1989. The petitioner was not named in the charge-sheet and was not put on trial in the aforesaid case. It is also the admitted case of the St. respondents that the District Magistrate, after noticing the criminal case and after recording his opinion that the petitioner was wrongly named in the FIR, certified the character of the petitioner and recommended him for appointment. **The case registered against the petitioner was**

**trivial in nature.** The petitioner hails from a small town and there is nothing on record to show that the antecedents or character of the petitioner makes him unsuitable for appointment on the post. It is also not the case of the respondents that **apart from the indiscretion of the petitioner regarding non-disclosure of the criminal case, the antecedents and character of the petitioner were such that he would otherwise be unsuitable for appointment on the post of constable.** The petitioner had submitted another affidavit (dated 26.7.2018) disclosing the criminal case registered against him and the said affidavit was submitted before the report of the District Magistrate (dated 28/31.7.2018). **No intention to deceive the employer can be imputed to the petitioner. In view of the aforesaid, the petitioner is entitled to a relief commanding the St. respondents to issue an appointment letter to him for appointment to the post of Constable.** (Para 20)

**Writ petition allowed**. (E-4)

**Precedent followed:**

1. St. of W.B. & ors. Vs Mitul Kumar Jana, Civil Appeal No. 8510 of 2011 (Para 5)

2. Commissioner of Police, Delhi & anr. Vs Dhaval Singh, 1999 (1) SCC 246 (Para 5)

3. Joginder Singh Vs Union Territory of Chandigarh & ors., 2015 (2) SCC 377 (Para 5)

4. Avtar Singh Vs U.O.I. & ors., 2016 (8) SCC 471 (Para 5)

5. Pawan Kumar Vs U.O.I. & anr., (2022) SCC OnLine SC 532 (Para 5)

6. Ravindra Kumar Vs SU & ors., (2024) SCC OnLine SC 180 (Para 5)

7. Vishal Kumar Vs St. of U.P. & ors., Special Appeal No. 532 of 2023 (Para 5)

8. Satyendra Singh Vs St. of U.P. & ors., Writ – A No. 16791 of 2023 (Para 6)

9. Chandrajeet Kumar Gond Vs High Court of Judicature at Allahabad, 2024 SCC Online Allahabad 251 (Para 6)

10. The St. of M.P. & ors. Vs Bhupendra Yadav, (2023) LiveLaw (SC) 810 (Para 6)

11. Satish Chandra Yadav Vs U.O.I. & ors., 2022 LiveLaw (SC) 798 (Para 6)

12. Ram Kumar Vs St. of U.P. & ors., (2011) 14 SCC 709 (Para 15)

**Present petition challenges order dated 04.03.2019, passed by The Superintendent of Police, Ballia, rejecting the claim of the petitioner for being appointed as Constable in U.P. Police.**

(Delivered by Hon'ble Salil Kumar Rai, J.)

1. The issue in the present petition is as to whether the appointing authority can deny appointment to a selected candidate only on the ground of non-disclosure of a criminal case registered against him even though the candidate was not named as an accused in the charge sheet and was not put on trial in the said case.

2. The facts of the case are that the petitioner was selected for appointment as constable in the selections held in pursuance to the advertisement issued in 2015 by the Uttar Pradesh Police Recruitment and Promotion Board, Lucknow. The selected candidates were asked to file an affidavit disclosing whether any criminal case had been registered against them or was pending consideration in any court. The candidates were warned that in case any information given in the affidavit was found to be wrong, they would be liable to be dismissed or removed from service. The petitioner submitted his affidavit dated 11.06.2018 putting a cross against the column which required disclosure of criminal cases, representing

that no criminal case was either registered or pending against the petitioner. It has been stated by the petitioner that subsequently he came to know that on 01.04.2017, a Criminal Case No. 0170 of 2017 under Sections 147/ 323/452/325 of the Indian Penal Code and Section 3(1)(x) SC/ST (Prevention of Atrocities) Act, 1989 had been registered against him but the petitioner was not named in the charge-sheet which was filed on 24.05.2017. The case of the petitioner is that he came to know about the criminal case registered against him after he had filed his affidavit, therefore, he filed another affidavit dated 26.07.2018 before the respondent authorities disclosing the details of the criminal case. The District Magistrate, in his report dated 28/31.07.2018, recommended that the petitioner was fit to be appointed as Constable after noting that the petitioner had been wrongly named in the First Information Report registering Criminal Case No. 0170 of 2017 and that no other criminal case was registered against the petitioner. The said report was made by the District Magistrate in discharge of his duties under the Office Memorandum dated 28.04.1958 issued by the Government of Uttar Pradesh regarding the verification of character and antecedents of applicants for government service before their first appointment. However, the Superintendent of Police, Ballia vide his order dated 04.11.2018 rejected the claim of the petitioner for appointment as Constable on the ground that the petitioner had, in his affidavit, concealed the criminal case registered against him. While passing the aforesaid order, the Superintendent of Police, Ballia relied on Clause 8 (Ja) of the Office Instructions dated 22.05.2018 which provides that a candidate would be declared unfit for appointment if he had concealed or made any misrepresentation regarding any criminal case registered against him or regarding any trial, acquittal or conviction in a criminal case or if the candidate had been convicted for any offence involving moral turpitude.

3. The order dated 04.11.2018 was challenged by the petitioner through Writ - A No. 24973 of 2018 which was disposed of by this Court vide its order dated 11.12.2018 noting the statement of the Standing Counsel that the Superintendent of Police, Ballia shall reconsider the claim of the petitioner for appointment in accordance with law. The Superintendent of Police, Ballia vide his order dated 04.03.2019 has again rejected the claim of the petitioner for being appointed as Constable in U.P. Police. The claim of the petitioner has been rejected on the ground that in his first affidavit the petitioner had knowingly concealed the criminal case registered against him. The explanation of the petitioner that he had no knowledge of the criminal case at the time of filing the first affidavit has been disbelieved on the ground that the Investigating Officer had recorded the statement of the petitioner on 26.04.2017, i.e., before the petitioner had filed his first affidavit. The order dated 04.03.2019 has been challenged in the present writ petition.

4. A counter affidavit has been filed by the State respondents which reiterates the facts recorded in the orders dated 04.11.2018 and 04.03.2019 passed by the Superintendent of Police, Ballia.

5. It was argued by the counsel for the petitioner that while passing the order dated 04.03.2019, the Superintendent of Police has not considered the report of the District Magistrate recommending the

petitioner to be fit for appointment as Constable after noting that the petitioner had been wrongly named in the First Information Report and had been excluded from the charge-sheet and that no other case had been registered against the petitioner. It was argued that in light of the Office Memorandum dated 28.04.1958, the recommendations of the District Magistrate had to be considered by the Superintendent of Police. It was argued that the failure of the petitioner to disclose the criminal case pending against him did not amount to active misrepresentation or an intention to deceive the authorities, therefore, the respondents could not have legally denied the petitioner's appointment as Constable because of non-disclosure of the criminal case. It was further argued that, in any case, the criminal case registered against the petitioner was trivial in nature and did not disqualify the petitioner for appointment as constable especially because the petitioner was not named in the charge sheet, therefore, the alleged concealment by the petitioner was not a material suppression warranting denial of appointment to the petitioner. It was argued that the impugned order has been passed mechanically and without any application of mind by the Superintendent of Police and is arbitrary. It was argued that for the aforesaid reasons, the order dated 4.3 2019 passed by the Superintendent of Police, Ballia is contrary to law and is liable to be quashed. In support of his contention, the counsel for the petitioner has relied on the judgment and order dated 22.08.2023 passed by the Supreme Court in **Civil Appeal No. 8510 of 2011 (State of West Bengal and Ors. vs. Mitul Kumar Jana** and the judgments reported in Commissioner of **Police, Delhi & Anr. vs. Dhaval Singh 1999 (1) SCC 246; Joginder Singh vs. Union Territory of Chandigarh & Ors. 2015 (2) SCC 377; Avtar Singh vs. Union of India & Ors. 2016 (8) SCC 471; Pawan Kumar vs. Union of India & Anr. (2022) SCC OnLine SC 532; Ravindra Kumar vs. State of U.P. & Ors. (2024) SCC OnLine SC 180 and Vishal Kumar vs. State of U.P. & 4 Ors. (Special Appeal No. 532 of 2023).**

6. Rebutting the contention of the counsel for the petitioner, the Standing Counsel has argued that the petitioner had knowingly made a false representation indicating that no criminal case was registered or pending against him. It was argued that the concealment and the misrepresentation by the petitioner were material suppression disqualifying him for appointment as Constable and there is no illegality in the order passed by the Superintendent of Police rejecting the claim of the petitioner. It was argued that for the aforesaid reasons, the writ petition is liable to be dismissed. In support of his contention, the Standing Counsel has relied on the judgments of this Court reported in **Satyendra Singh vs. State of U.P. & Ors. (Writ – A No. 16791 of 2023)** as well as the judgment of a Division Bench of this Court in **Chandrajeet Kumar Gond vs. High Court of Judicature at Allahabad 2024 SCC Online Allahabad 251** and of the Supreme Court reported in **The State of Madhya Pradesh & Ors. vs. Bhupendra Yadav (2023) LiveLaw (SC) 810 and Satish Chandra Yadav vs. Union of India & Ors. 2022 LiveLaw (SC) 798.**

7. I have considered the submissions of the counsel for the parties.

8. In **Avtar Singh (supra)**, the Supreme Court, after considering its previous judgements, observed that the 'whole idea of verification of character and

antecedents is that the person suitable for the post in question is appointed' and that 'an incumbent should not have antecedents of such a nature which may adjudge him unsuitable for the post.' It was observed that mere involvement in some petty kind of case would not render a person unsuitable for the job. The Supreme Court further held that suppression of material information presupposes that suppression is of facts which matter and failure to disclose a trivial matter would not be relevant to refuse appointment or to cancel the selection. The Supreme Court observed that a person who had suppressed material information may not claim unfettered right of appointment or continuity in service but he had a right not to be dealt with arbitrarily and exercise of power had to be in a reasonable manner having due regard to the facts. The yardstick to be applied while taking a decision depended on the nature of the post and chance of reformation had to be afforded to young offenders in suitable cases. It was also held by the Court that the employer had to act on due consideration of rules / instructions. The Supreme Court summarized the law regarding appointment, offer of appointment, cancellation of offer or termination of appointment in cases where the applicant had either suppressed the facts regarding criminal cases registered against him or was acquitted / convicted in any criminal case. Paragraph nos. 35 to 38 of the judgment of the Supreme Court expounding the law on the aspect are reproduced below:-

> ***"35. Suppression of "material" information presupposes that what is suppressed that "matters" not every technical or trivial matter. The employer has to act on due consideration of rules/instructions, if any, in exercise of powers in order to cancel candidature or for terminating the services of employee. Though a person who has suppressed the material information cannot claim unfettered right for appointment or continuity in service but he has a right not to be dealt with arbitrarily and exercise of power has to be in reasonable manner with objectivity having due regard to facts of cases.***
>
> ***36. What yardstick is to be applied has to depend upon the nature of post, higher post would involve more rigorous criteria for all services, not only to uniformed service. For lower posts which are not sensitive, nature of duties, impact of suppression on suitability has to be considered by authorities concerned considering post/nature of duties/services and power has to be exercised on due consideration of various aspects.***
>
> ***37.*** *The "McCarthyism" is antithesis to constitutional goal,* ***chance of reformation has to be afforded to young offenders in suitable cases,*** *interplay of reformative theory cannot be ruled out in toto nor can be generally applied but is one of the factors to be taken into consideration while exercising the power for cancelling candidature or discharging an employee from service.*
>
> *38. We have noticed various decisions and tried to explain and reconcile them as far as possible. In view of the aforesaid*

*discussion, we summarize our conclusion thus:*

*38.1 Information given to the employer by a candidate as to conviction, acquittal or arrest, or pendency of a criminal case, whether before or after entering into service must be true and there should be no suppression or false mention of required information.*

*38.2* ***While passing order of termination of services or cancellation of candidature for giving false information, the employer may take notice of special circumstances of the case, if any, while giving such information.***

*38.3* ***The employer shall take into consideration the Government orders/instructions/rules, applicable to the employee, at the time of taking the decision.***

*38.4* ***In case there is suppression or false information of involvement in a criminal case where conviction or acquittal had already been recorded before filling of the application/verification form and such fact later comes to knowledge of employer, any of the following recourses appropriate to the case may be adopted : -***

*38.4.1* ***In a case trivial in nature in which conviction had been recorded, such as shouting slogans at young age or for a petty offence which if disclosed would not have rendered an incumbent unfit for post in question, the employer may, in its discretion, ignore such suppression of fact or false information by condoning the lapse****.*

*38.4.2. Where conviction has been recorded in case which is not trivial in nature, employer may cancel candidature or terminate services of the employee.*

*38.4.3* ***If acquittal had already been recorded in a case involving moral turpitude or offence of heinous/serious nature, on technical ground and it is not a case of clean acquittal, or benefit of reasonable doubt has been given, the employer may consider all relevant facts available as to antecedents, and may take appropriate decision as to the continuance of the employee.***

*38.5 In a case where the employee has made declaration truthfully of a concluded criminal case, the employer still has the right to consider antecedents, and cannot be compelled to appoint the candidate.*

*38.6 In case when fact has been truthfully declared in character verification form regarding pendency of a criminal case of trivial nature, employer, in facts and circumstances of the case, in its discretion, may appoint the candidate subject to decision of such case.*

*38.7* ***In a case of deliberate suppression of fact with respect to multiple pending cases such false information by itself will assume significance and an employer may pass appropriate order cancelling candidature or terminating services as appointment of a person against whom multiple***

***criminal cases were pending may not be proper.***

*38.8 If criminal case was pending but not known to the candidate at the time of filling the form, still it may have adverse impact and the appointing authority would take decision after considering the seriousness of the crime.*

*38.9 In case the employee is confirmed in service, holding departmental enquiry would be necessary before passing order of termination/removal or dismissal on the ground of suppression or submitting false information in verification form.*

*38.10 For determining suppression or false information attestation/verification form has to be specific, not vague. Only such information which was required to be specifically mentioned has to be disclosed. If information not asked for but is relevant comes to knowledge of the employer the same can be considered in an objective manner while addressing the question of fitness. However, in such cases action cannot be taken on basis of suppression or submitting false information as to a fact which was not even asked for.*

*38.11 Before a person is held guilty of suppressioveri or suggestio falsi, knowledge of the fact must be attributable to him."*

(emphasis supplied)

9. Subsequently, the Supreme Court in **Ravindra Kumar (supra)** held that there was no hard-and-fast or cut-and-dried rule that, in all circumstances, non disclosure of a criminal case would be fatal for a candidate's employment even if the candidate was acquitted in the criminal case. The Court held that each case would turn on its special facts and circumstances. The court further observed ***that broad-brushing every non-disclosure as a disqualification, would be unjust and the same would tantamount to being completely oblivious to the ground realities*** obtaining in this great, vast and diverse country and the court will have to take a holistic view, based on objective criteria, with the available precedents serving as a guide and it can never be a one size fits all scenario. The Supreme Court after considering its previous judgment in **Satish Chandra Yadav (supra)** observed, in paragraph no. 31of the report, that the 'nature of the office, the timing and **nature of the criminal case; the overall consideration of the judgement of acquittal**; the nature of the query in the application/verification form; the contents of the character verification reports; **the socio economic strata of the individual applying; the other antecedents of the candidate**; the nature of consideration and the contents of the cancellation/termination order' ***were some of the crucial aspects which should enter the judicial verdict in adjudging the suitability and in determining the nature of relief to be ordered***. It would be relevant to note that in ***Ravindra Kumar (Supra)***, the Supreme Court, while deciding in favour of the selected candidate, took note of the fact that the candidate hailed from a small village, there was no criminal case pending against him on the date of filing the application form, the criminal case was registered against the candidate when he was only 21 years of age, the verification report after noticing the criminal case and the subsequent acquittal stated that the character of the candidate was good and

that no complaints were found against him. The general reputation of the candidate was good, the Station House Officer in his report had certified the character of the candidate as excellent and that the candidate was eligible to do Government Service under the State Government. The court also noticed that the report of the Station House Officer was endorsed by the Superintendent of Police who reiterated that the character of the candidate was excellent.

10. At this stage, it would be relevant to consider some of the judgments referred by the Standing Counsel to support the impugned order. In ***Bhupendra Yadav (supra)***, a criminal case under Sections 341/354 (D) of the Indian Penal Code read with Sections 11(D)/12 of the POCSO Act was registered against the applicant. During the trial of the case a compromise was arrived at between the applicant and the complainant. A compromise application was filed as a result of which the charge under Section 341 I.P.C. was compounded. So far as charges under Section 354(D) and Sections 11(D)/12 of the POCSO Act were concerned, the trial court acquitted the applicant because the prosecutrix and other prosecution witnesses had turned hostile and refused to support the case set up by the prosecution. Subsequently, the applicant was appointed on the post of constable after having qualified the selection test held for filling up vacancies on the post of constable. After his joining, the applicant was asked to furnish in the Verification form certain informations, including informations on criminal cases pending or registered against him. The applicant disclosed the details of the aforesaid criminal case indicating that he had been acquitted in the said case by the trial court. An order was passed by the appointing authority holding the applicant to be unfit for government service on the ground that offences under Section 354-D and Sections 11(D)/12 of the POCSO Act were offences of moral turpitude. It was argued before the Supreme Court that the order of the appointing authority was bad in law because the applicant, while filling the verification form, had furnished all the requisite informations and had truthfully disclosed the facts of the criminal case and its final outcome and that the applicant had been acquitted in the case. The Supreme Court after referring to to Paragraph nos. 38.4.3 and 38.5 of the judgment in ***Avtar Singh (Supra)*** held that even in cases of truthful disclosure the employer was well within its rights to examine the fitness of a candidate and in a concluded criminal case, the employer had to keep in mind the nature of the offence and verify whether the acquittal is honourable or benefit has been extended to the accused on technical grounds. It was held by the Supreme Court that the employer was empowered not to appoint a candidate or continue the incumbent on the post if the employer arrives at the conclusion that the candidate is a suspect character or unfit for the post. The Supreme Court noted that the charges against the applicant involved moral turpitude and that his acquittal was not a clean and honourable acquittal but the acquittal was because of the compromise between the complainant and the applicant and during trial the prosecutrix as well as other prosecution witness had refused to support the case of the prosecution.

11. In ***Satish Chandra Yadav (supra)***, a charge sheet had been filed against the employee. The Supreme Court recognized that each case had to be scrutinized thoroughly by the employer concerned and the Court is obliged to

examine whether the procedure of inquiry adopted by the authority concerned was fair and reasonable. Considering its own judgment in ***Satish Chandra Yadav (supra)***, the Supreme Court in ***Ravindra Kumar (Supra)*** held that mere non-disclosure of a criminal case by a candidate who had been acquitted in the said criminal case cannot be fatal for the candidate's employment and broad brushing every non-disclosure as a disqualification would be unjust.

12. In **Chandrajeet Kumar Gond (supra)**, the Division Bench of this Court (of which I was a member) rejected the claim of the petitioner and affirmed the order passed by the employer terminating the services of the employee as the case registered against the petitioner was under Section 307 of IPC and was, therefore, serious in nature.

13. As noted above, in **Avtar Singh (Supra)**, the Supreme Court held that while deciding the suitability for appointment of a selected candidate against whom a criminal case had been registered, the employer had to take into consideration the Government orders/instructions/rules applicable at the time of taking the decision. Hence, at this stage it would be relevant to refer to the rules and instructions of the State Government regarding the verification of the character and antecedents of applicants for government service before their first appointment. The Office Memorandum dated 28.4.1958 prescribes the manner in which the appointing authority shall verify the character and antecedents of applicants for government service and also the factors which may be relevant for such verification. The Office Instructions dated 22.5.2018 issued by the Superintendent of Police (Personnel) also prescribes the procedure and factors to be taken into consideration while verifying the character of an applicant for appointment as Constable in U.P. Police.

14. Clause 3 (b) of the Office Memorandum dated 28.04.1958 provides that in cases of doubt regarding the conduct and character of the candidate, the appointing authority may either ask for further references or may refer the matter to the District Magistrate concerned who may then make such further inquiries as he considers necessary. A reading of Clause 3 (b) and the Note to Clause 3 shows that the report of the District Magistrate is a relevant and an important material to be taken into consideration while deciding the suitability of a candidate for appointment to any post under the State Government. The Note to Clause 3 provides that a mere conviction by itself would not be a cause to refuse a certificate of good character and would also not be a disqualification for appointment to government service. It is the entire circumstances in which the conviction was recorded and the circumstances in which the candidate is presently placed which should be considered while deciding the suitability of the candidate for appointment to government service. The Note also acknowledges that while deciding the suitability of the candidate for appointment to government service the fact that he had completely reformed himself would be relevant. Clause 3 of the Office Memorandum dated 28.04.1958 and the Note attached to the clause are reproduced below:-

*"3. a) Every direct recruit to any service under the Uttar*

*Pradesh Government will be required to produce:*

*(i) A certificate of conduct and character from the head of the educational institution where he last studied (if he went to such an institution).*

*(ii) Certificates of character from two persons. The appointing authority will lay down requirements as to kind of persons from whom it desires these certificates.*

*(b) In cases of doubt, the appointing authority may either ask for further references, or may refer the case to the District Magistrate concerned. The District Magistrate may then make such further enquiries as he considers necessary.*

*Notes.-(a)* ***A conviction need not of itself involve the refusal of a certificate of good character. The circumstances of the conviction should be taken into account*** *and if they involve no moral turpitude or association with crimes of violence or with a movement which has as its object to overthrow by violent means of Government as by law now established in free India the* ***mere conviction need not be regarded as disqualification****. (Conviction of a person during his childhood should not necessarily operate as a bar to his entering Government service.* ***The entire circumstances in which his conviction was recorded as well as the circumstances in which he is now placed should be taken into consideration. If he has completely reformed himself on attaining the age of understanding and discretion, mere conviction in childhood should not operate as a bar to his entering Government service).***

*(b) While no person should be considered unfit for appointment solely because of his political opinions, care should be taken not to employ persons who are likely to be disloyal and to abuse the confidence placed in them by virtue of their appointment. Ordinarily, persons who are actively engaged in subversive activities including members of any organization the avowed object of which is to change the existing order of society by violent means should be considered unfit for appointment under Government. Participation in such activities at any time after attaining the age of 21 years and within three years of the date of enquiry should be considered as evidence that the person is still actively engaged in such activities unless in the interval there is positive evidence of a change of attitude,*

*(c) Persons dismissed by the Central Government or by a State Government will also be deemed to be unfit for appointment to any service under this Government.*

*In the case of direct recruits to the State Services under the Uttar Pradesh Government besides requiring the candidates to submit the certificates mentioned in paragraph 3 (a) above the appointing authority shall refer all cases simultaneously to the Deputy Inspector General of Police, Intelligence and the District*

*Magistrate [of the home district and of the district(s) where the candidate has resided for more than a year within five years of the date of the inquiry) giving full particulars about the candidate. The District Magistrate shall get the reports in respect of the candidates from the Superintendent of Police who will consult District Police Records and records of the Local Intelligence Unit. The District Police or the District Intelligence Unit shall not make any enquiries on the spot, but shall report from their records whether there is anything against the candidate, but if in any specific case the District magistrate, at the instance of the appointing authority asks for an enquiry on the spot, the Local Police or the Local Intelligence Units will do so and report the result to him. The District Magistrate shall then report his own views to the appointing authority. Where the District Police or the Local Intelligence Units report adversely about a candidate, the District Magistrate may give the candidate a hearing before sending his report."*

15. The importance of the Office Memorandum dated 28.04.1958 was noticed by the Supreme Court in ***Ram Kumar vs. State of U.P. & Others (2011) 14 SCC 709*** which was also considered by the Supreme Court in ***Avtar Singh (Supra)***. In ***Ram Kumar (supra)*** the candidate had challenged the order of the appointing authority cancelling his selection after he was appointed on the post. The appointing authority had cancelled the selection only on the ground that in his affidavit the applicant had not disclosed that a criminal case under Sections 323/34/504 IPC had been registered against him in which he had been acquitted. The Supreme Court held that in view of the Office Memorandum dated 28.04.1958, it was the duty of the appointing authority to satisfy itself as to whether the applicant was suitable for appointment to the post of Constable with reference to nature of suppression and nature of the criminal case. The Supreme Court held that the appointing authority could not have found the applicant unsuitable for appointment to the post of Constable merely because the applicant had furnished an affidavit stating incorrectly the facts regarding registration of a criminal case against him even though he was acquitted in the criminal case. The Supreme Court consequently quashed the order of the appointing authority cancelling the selection and appointment of the applicant and directed that that the applicant be reinstated in service. However, the Supreme Court denied back-wages for the period the candidate remained out of service. The relevant observations of the Supreme Court in paragraph nos. 9 to 14 of the report are reproduced below:-

*"9. We have carefully read the Government Order dated 28-4-1958 on the subject "Verification of the character and antecedents of government servants before their first appointment" and it is stated in the government order that the Governor has been pleased to lay down the following instructions in supersession of all the previous orders:*

*"The rule regarding character of candidate for appointment under the State*

*Government shall continue to be as follows:*

*The character of a candidate for direct appointment must be such as to render him suitable in all respects for employment in the service or post to which he is to be appointed. It would be the duty of the appointing authority to satisfy itself on this point."*

*10.* ***It will be clear from the aforesaid instructions issued by the Governor that the object of the verification of the character and antecedents of government servants before their first appointment is to ensure that the character of a government servant for a direct recruitment is such as to render him suitable in all respects for employment in the service or post to which he is to be appointed and it would be a duty of the appointing authority to satisfy itself on this point.***

*11. In the facts of the present case, we find that though Criminal Case No. 275 of 2001 under Sections 324/323/504 IPC had been registered against the appellant at Jaswant Nagar Police Station, District Etawah, admittedly the appellant had been acquitted by order dated 18-7-2002 by the Additional Chief Judicial Magistrate, Etawah.*

*12. On a reading of the order dated 18-7-2002 of the Additional Chief Judicial Magistrate it would show that the sole witness examined before the court, PW 1, Mr Akhilesh Kumar, had deposed before the court that on 2-12-2000 at 4.00 p.m. children were quarrelling and at that time the appellant, Shailendra and Ajay Kumar amongst other neighbours had reached there and someone from the crowd hurled abuses and in the scuffle Akhilesh Kumar got injured when he fell and his head hit a brick platform and that he was not beaten by the accused persons by any sharp weapon. In the absence of any other witness against the appellant, the Additional Chief Judicial Magistrate acquitted the appellant of the charges under Sections 323/34/504 IPC. On these facts, it was not at all possible for the appointing authority to take a view that the appellant was not suitable for appointment to the post of a police constable."*

16. So far as the Office Instructions dated 22.5.2018 is concerned, Clause 8(Ja) of the Office Instructions provides that an applicant for appointment in Police force in State of Uttar Pradesh shall be declared unfit for appointment if he had concealed the fact that a criminal case had been registered against him. However, Clause 8 (Ja) of the Government order also provides that where a candidate had been acquitted or convicted by a court in any criminal case, the matter shall be referred to the District Magistrate who shall submit his report/ recommendation regarding the fitness of the candidate for appointment and the Superintendent of Police shall take a decision ***in accordance with the recommendations of the District Magistrate.*** The first part of the Government Order, i.e., the part which provides that a candidate shall, in accordance with law, be declared unfit for appointment in case of concealment or

misrepresentation has to be read along with the principles laid down in ***Avtar Singh (Supra)*** and ***Ravindra Kumar (Supra)*** that even a candidate who has suppressed information has a right not to be dealt with arbitrarily and exercise of power has to be in a reasonable manner. Any other reading of Clause 8(Ja) would result in arbitrariness and would thus violate the constitutional principle of fairness and non-arbitrariness.

17. The principles deducible from the judicial precedents referred earlier and also the Office memorandum dated 28.4.1958 as well as the Office Instructions dated 22.5.2018, so far as they are relevant for a decision of the present writ petition, are that the purpose of seeking information from the candidate regarding any criminal case registered or pending against him is to verify the character and antecedents of the candidate. ***Verification of character and antecedents of a candidate is required to adjudge the suitability of the candidate for appointment***. A candidate who has suppressed material information cannot claim unfettered right for appointment but he has a right not to be dealt with arbitrarily and the decision of the competent authority has to be reasonable and objective having due regards to the facts of the case. ***Broad-brushing every non-disclosure as a disqualification would be unjust and it would be arbitrary and unreasonable to disqualify a candidate merely because of non-disclosure of a criminal case which was trivial in nature and related to a petty offence which if disclosed would not have rendered him unfit for post in question. Consequently, any statute/rules/instructions which empowers the employer to deny appointment to a candidate only because of non-disclosure of criminal cases*** would also be unjust and unreasonable and any decision by the employer denying appointment only because of such non-disclosure would also be contrary to the constitutional principle of fairness and non-arbitrariness in administrative actions. In cases where there is non-disclosure of criminal case by the candidate, the nature of the case and the seriousness of the offence with which the applicant is charged, the end result of the trial and if the applicant was acquitted the reasons for acquittal-whether the acquittal was a clean acquittal or the applicant has been acquitted on a technical ground and given benefit of doubt - as well as the socio-economic status of the candidate are some of the factors which are also to be considered while adjudging the suitability of a candidate for appointment. In a case trivial in nature or for a petty offence, the employer may ignore suppression of fact or false information by condoning the lapse if the applicant is not otherwise unfit for appointment. The report of the District Magistrate regarding the character and antecedents of the candidate and also the recommendations of the District Magistrate are relevant documents which have to be considered by the appointing authority while deciding the suitability of a candidate for appointment. The aforesaid factors are also to be considered by the courts while deciding the nature of relief to be given to a candidate.

18. In his impugned order dated 04.03.2019, the Superintendent of Police, relying on Clause 8 (Ja) of the Office Instructions dated 22.5.2018, has mechanically rejected the claim of the petitioner only on the ground of non-disclosure of the criminal case by the petitioner. While rejecting the claim of the petitioner, the Superintendent of Police has not considered the report of the District Magistrate which recommended the

petitioner fit for appointment. While deciding the claim of the petitioner, the appointing authority has neither considered the nature of alleged suppression nor the nature of the case registered against the petitioner and has also not considered the fact that the petitioner was not even put on trial in the case. The socio-economic status of the petitioner has also not been considered by the Superintendent of Police and there is no consideration regarding the suitability of the petitioner for appointment. The order dated 4.3.2019 passed by the Superintendent of Police is contrary to law and is liable to be quashed.

19. So far as the relief to be granted to the petitioner is concerned, normally in cases where an authority has wrongly exercised its discretion while passing an order, the matter, after quashing the order is remitted back to the authority concerned to pass fresh orders. However, in the present case, the petitioner has been disqualified and has been refused appointment letter only on the ground of non-disclosure of a criminal case registered against him. In view of the reasons given above, mere non-disclosure of the criminal case could not be fatal for the appointment of the petitioner. Further, the matter is pending in this Court since 2019 and the petitioner was selected in the selections held in pursuance to the notification issued in 2015. In view of the aforesaid and also for reasons stated subsequently, no useful purpose would be served to remit back the matter to the Superintendent of Police, Ballia for a fresh decision.

20. The admitted facts in the present case are that only one criminal case had been registered against the petitioner. It is not the case of the State respondents that multiple criminal cases were registered against the petitioner. The case was registered under Sections 147/323/452/325 of the Indian Penal Code read with Section 3 (1) (x) Schedule Castes and Schedule Tribes (Prevention of Atrocities) Act, 1989. The petitioner was not named in the charge-sheet and was not put on trial in the aforesaid case. It is also the admitted case of the State respondents that the District Magistrate, after noticing the criminal case and after recording his opinion that the petitioner was wrongly named in the First Information Report, certified the character of the petitioner and recommended him for appointment. The case registered against the petitioner was trivial in nature. The petitioner hails from a small town and there is nothing on record to show that the antecedents or character of the petitioner makes him unsuitable for appointment on the post. It is also not the case of the respondents that apart from the indiscretion of the petitioner regarding non-disclosure of the criminal case, the antecedents and character of the petitioner were such that he would otherwise be unsuitable for appointment on the post of constable. It is also noticed that the petitioner had submitted another affidavit disclosing the criminal case registered against him and the said affidavit was submitted before the report of the District Magistrate. The recommendations of the District Magistrate are dated 28/31.7.2018 and the second affidavit filed by the petitioner disclosing the criminal case was filed on 26.7.2018. No intention to deceive the employer can be imputed to the petitioner. In view of the aforesaid, the petitioner is entitled to a relief commanding the State respondents to issue an appointment letter to him for appointment to the post of Constable.

21. For the aforesaid reasons, the order dated 04.03.2019 passed by the

Superintendent of Police, Ballia is hereby quashed.

22. The respondents - State authorities, i.e., the Secretary, Department of Home (Police Section), Government of Uttar Pradesh, Lucknow, the Secretary, U.P. Police Recruitment and Promotion Board, Lucknow, the Superintendent of Police (Personnel) Uttar Pradesh Police Headquarter, Allahabad/ Prayagraj and the Superintendent of Police, District Ballia are hereby directed to ensure that appropriate appointment letter is issued to the petitioner appointing him on the post of Constable in pursuance to the recruitment notified in 2015 and the petitioner shall be allowed to join as such. The appointment letter shall be issued to the petitioner by the competent authority within a period of one month from today, and in any case, by 15th December, 2024.

23. It is clarified that the petitioner shall be entitled to the service benefits, including his pay and other allowances as well as seniority, as a consequence of his appointment, only with effect from the date of his joining.

24. With the aforesaid directions and observations, the writ petition is allowed.

25. A copy of this order be communicated to the Secretary, Department of Home (Police Section), Government of Uttar Pradesh, Lucknow, the Secretary, U.P. Police Recruitment and Promotion Board, Lucknow, the Superintendent of Police (Personnel) Uttar Pradesh Police Headquarter, Allahabad/ Prayagraj and the Superintendent of Police, District Ballia by the Registrar (Compliance) within ten days from today.

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**(2024) 11 ILRA 586**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 08.11.2024**

**BEFORE**

**THE HON'BLE ABDUL MOIN, J.**

Writ -A No. 6187 of 2024

**Jitendra Kandwal ...Petitioner**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Alok Singh

**Counsel for the Respondents:**
C.S.C., Rishabh Tripathi

**A. Service Law – Gratuity – Payment of Gratuity Act, 1972 - Section 7 - Payment of Gratuity (Central) Rules, 1972 - Rule 7 - The word used in Rule 7(1) of the Rules 1972 is "may" meaning thereby that it is open for the employee to either apply for payment for gratuity or not. Once Section 7(2) of Act, 1972 itself stipulates that irrespective of an employee applying for gratuity or not the gratuity would become payable** and that the said amount is to be paid in terms of Section 7(3) of Act, 1972 within thirty day of the same becoming payable then irrespective of Rule 7 of the Rules, 1972 which gives a discretion to the employee concerned to apply for gratuity or not under provisions of Act, 1972 the gratuity would in fact become payable and due and thus **no application in this regard would be required to be submitted by the employee.** (Para 17)

From perusal of Rule 7 of Rules, 1972 it emerges that Rule 7(1) of Rules, 1972 provides that an employee who is eligible for payment of gratuity under the Act, 1972 **where the date of superannuation or retirement of an employee is known <u>may</u> apply to the employer before thirty days of the date of superannuation or retirement.** (Para 16)

Petitioner having superannuated on 31.12.2019 and gratuity would fall due on 01.01.2020 and that u/s 7(3) of the Act, 1972, should have been paid by 01.02.2020. Gratuity became payable to the petitioner on 01.02.2020 and the same having been in fact paid to the petitioner on 03.11.2020 the petitioner would be entitled for being paid interest on delayed payment of gratuity which interest would be payable as per the provisions of Section 7(3) of Act, 1972. (Para 15, 18)

**Writ petition allowed**. (E-4)

**Present petition prays for a writ of mandamus commanding the respondents to pay 18% interest on the amount of gratuity for delayed period from the date of retirement i.e. 31.12.2019 upto the date of payment i.e. 05.11.2020.**

(Delivered by Hon'ble Abdul Moin, J.)

1. Heard learned counsel for petitioner, learned Standing Counsel for respondent no. 1 and Shri Rishabh Tripathi, learned counsel for respondents no.2 to 4.

2. The instant writ petition has been filed praying for a writ of mandamus commanding the respondents to pay 18% interest on the amount of gratuity for delayed period from the date of retirement i.e. 31.12.2019 upto the date of payment i.e. 05.11.2020.

3. Briefly stated the facts of the case are that the petitioner retired on attaining the age of superannuation on 31.12.2019 from service under respondent no. 2. The gratuity has been paid to the petitioner on 05.11.2020 and hence the instant petition for payment of interest.

4. The contention of learned counsel for the petitioner is that as there is delay in payment of gratuity to the petitioner consequently considering the provisions of the Payment of Gratuity Act, 1972 (hereinafter referred to as the Act, 1972) the respondents are bound to pay interest for the aforesaid delayed period.

5. On the other hand, Shri Rishabh Tripathi, learned counsel appearing for the respondents no. 2 to 4 on the basis of averments contained in the counter affidavit states that as per Section 7 of the Act, 1972 as well as Rule 7 of the Payment of Gratuity (Central) Rules, 1972 (hereinafter referred to as the Rules, 1972) the petitioner had to apply to the respondents before 30 days of the date of superannuation or retirement for payment of gratuity and it is only thereafter that the liability for making payment of gratuity to the petitioner by the respondents arises.

6. It is contended that the petitioner has only applied for payment of gratuity after his retirement which application has been made in the year 2020. The Divisional Logging Manager, Najibabad, Bijnor through his letter dated 23.09.2020, a copy of which is annexure CA-2 to the counter affidavit, wrote to the Secretary, E.P.F. Trust, U.P. Forest Corporation, Lucknow to provide all relevant service documents of the petitioner. Subsequent thereto the petitioner has been paid the entire amount of gratuity vide letter dated 19.11.2020. Shri Tripathi States that the amount of gratuity has been credited in the account of the petitioner on 03.11.2020. However learned counsel for the petitioner states that the gratuity has been credited in his account on 05.11.2020.

7. It is contended that once the provisions of the Act, 1972 and Rules, 1972 themselves provide for an application to be made by the employee concerned and in case the petitioner himself applied for

payment of gratuity in the year 2020 consequently no error has been committed by the respondents in making late payment of gratuity upon the petitioner having applied for being paid the gratuity belatedly and thus the gratuity having now been paid no interest is payable by the respondents.

8. Heard learned counsel for the parties and perused the record.

9. From the arguments as raised by learned counsel for the parties and from the perusal of records it emerges that the petitioner retired on attaining the age of superannuation on 31.12.2019. It is admitted by the parties that payment of gratuity to the petitioner is governed by Act, 1972 and Rules, 1972. The gratuity has been paid to the petitioner on 03.11.2020.

10. In order to consider the admissibility of interest, if any, to the petitioner, the Court may have to consider the relevant provisions of the Act, 1972.

11. Relevant extract of Section 4 of the Act, 1972 reads as under:

*"Section: 4 Payment of gratuity.*

*(1) Gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less than five years, -*

*(a) on his superannuation, or*

*(b) on his retirement or resignation, or*

*(c) on his death or disablement due to accident or disease:*

*Provided that the completion of continuous service of five years shall not be necessary where the termination of the employment of any employee is due to death or disablement:*

*Provided further that in the case of death of the employee, gratuity payable to him shall be paid to his nominee or, if no nomination has been made, to his heirs, and where any such nominees or heirs is a minor, the share of such minor, shall be deposited with the controlling authority who shall invest the same for the benefit of such minor in such bank or other financial institution, as may be prescribed, until such minor attains majority.]*

*Explanation. : For the purposes of this section, disablement means such disablement as incapacitates an employee for the work which he, was capable of performing before the accident or disease resulting in such disablement."*

12. Section 7 of the Act, 1972 reads as under:

*"Section: 7*

*Determination of the amount of gratuity.*

*(1) A person who is eligible for payment of gratuity under this Act or any person authorised, in writing, to act on his behalf shall send a written application to the employer, within such time and in such form, as may be prescribed, for payment of such gratuity.*

*(2) As soon as gratuity becomes payable, the employer*

*shall, whether an application referred to in sub-section (1) has been made or not, determine the amount of gratuity and give notice in writing to the person to whom the gratuity is payable and also to the controlling authority specifying the amount gratuity so determined.*

*(3) The employer shall arrange to pay the amount of gratuity within thirty days from the date it becomes payable to the person to whom the gratuity is payable. (3A) If the amount of gratuity payable under sub-section (3) is not paid by the employer within the period specified in sub-section (3), the employer shall pay, from the date on which the gratuity becomes payable to the date on which it is paid, simple interest at such rate, not exceeding the rate notified by the Central Government from time to time for repayment of long-term deposits, as that Government may, by notification specify:*

*Provided that no such interest shall be payable if the delay in the payment is due to the fault of the employee and the employer has obtained permission in writing from the controlling authority for the delayed payment on this ground.]*

*(4) (a) If there is any dispute as to the amount of gratuity payable to an employee under this Act or as to the admissibility of any claim of, or in relation to, an employee for payment of gratuity, or as to the person entitled to receive the gratuity, the employer shall deposit with the controlling authority such amount as he admits to be payable by him as gratuity.*

*(b) Where there is a dispute with regard to any matter or matters specified in clause (a), the employer or employee or any other person raising the dispute may make an application to the controlling authority for deciding the dispute.]*

*(c)] The controlling authority shall, after due inquiry and after giving the parties to the dispute a reasonable opportunity of being heard, determine the matter or matters in dispute and if, as a result of such inquiry any amount is found to be payable to the employee, the controlling authority shall direct the employer to pay such amount or, as the case may be, such amount as reduced by the amount already deposited by the employer.]*

*(d) The controlling authority shall pay the amount deposited, including the excess amount, if any, deposited by the employer, to the person entitled thereto.*

*(e) As soon as may be after a deposit is made under clause (a), the controlling authority shall pay the amount of the deposit - (i) to the applicant where he is the employee; or (ii) where the applicant is not the employee, to the nominee or, as the case may be, the guardian of such nominee or] heir of the employee if the controlling authority is satisfied that there is no dispute as to the right of the applicant to receive the amount of gratuity.*

*(5) For the purpose of conducting an inquiry under sub-section (4), the controlling authority shall have the same powers as are vested in a court, while trying a suit, under the Code of Civil Procedure, 1908 (5 of 1908), in respect of the following matters, namely : (a) enforcing the attendance of any person or examining him on oath; (b) requiring the discovery and production of documents, (c) receiving evidence on affidavits; (d) issuing commissions for the examination of witnesses.*

*(6) Any inquiry under this section shall be a judicial proceeding within the meaning of sections 193 and 228, and for the purpose of section 196, of the Indian Penal Code, 1860 (45 of 1860).*

*(7) Any person aggrieved by an order under sub-section (4) may, within sixty days from the date of the receipt of the order, prefer an appeal to the appropriate Government or such other authority as may be specified by the appropriate Government in this behalf:*

*Provided that the appropriate Government or the appellate authority, as the case may be, may, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the said period of sixty days, extend the said period by a further period of sixty days.*

*Provided further that no appeal by an employer shall be admitted unless at the time of preferring the appeal, the appellant either produces a certificate of the controlling authority to the effect that the appellant has deposited with him an amount equal to the amount of gratuity required to be deposited under subsection (4), or deposits with the appellate authority such amount.]*

*(8) The appropriate Government or the appellate authority, as the case may be, may, after giving the parties to the appeal a reasonable opportunity of being heard, confirm, modify or reverse the decision of the controlling authority."*

13. Rule 7 of the Rules, 1972 reads as under.

*"7. Application for gratuity.?*

*(1) An employee who is eligible for payment of gratuity under the Act, or any person authorised, in writing, to act on his behalf, shall apply, ordinarily within thirty days from the date the gratuity became payable, in Form ?I? to the employer:*

*Provided that where the date of superannuation or retirement of an employee is known, the employee may apply to the employer before thirty days of the date of superannuation or retirement.*

*(2) A nominee of an employee who is eligible for payment of gratuity under the second proviso to sub-section (1) of section 4 shall apply, ordinarily within thirty days from the date of gratuity became payable to him, in Form ?J? to the employer:*

*Provided that an application in plain paper with relevant particulars shall also be accepted. The employer may obtain such other particulars as may be deemed necessary by him.*

*(3) A legal heir of an employee who is eligible for payment of gratuity under the second proviso to sub-section (1) of section 4 shall apply, ordinarily within one year from the date of gratuity became payable to him, in Form ?K? to the employer.*

*(4) Where gratuity becomes payable under the Act before the commencement of these rules, the periods of limitation specified in subrules (1), (2) and (3) shall be deemed to be operative from the date of such commencement.*

*(5) An application for payment of gratuity filed after the expiry of the periods specified in this rule shall also be entertained by the employer, if the applicant adduces sufficient cause for the delay in preferring his claim, and no claim for gratuity under the Act shall be invalid merely because the claimant failed to present his application within the specified period. Any dispute in this regard shall be referred to the controlling authority for his decision.*

*(6) An application under this rule shall be presented to the employer either by personal service or by registered post acknowledgement due."*

14. From a perusal of Section 4(1) of the Act, 1972 it is apparent that gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less than five years on his superannuation. Further, from perusal of Section 7(1) of Act, 1972 it emerges that a person who is eligible for payment of gratuity under Act, 1972 has to send a written application to the employer for payment of gratuity. However Section 7(2) of the Act, 1972 provides that as soon as gratuity becomes payable, the employer shall, whether an application referred to in sub-section (1) has been made or not, determine the amount of gratuity and give notice in writing to the person to whom the gratuity is payable and also to the controlling authority specifying the amount of gratuity so determined. Section 7(3) of the Act, 1972 provides that the employer shall arrange to pay the amount of gratuity within thirty days from the date it becomes payable to the person to whom the gratuity is payable. Section 7(3A) of Act, 1972 provides that if the amount of gratuity payable under sub-section (3) is not paid by the employer within the period specified in sub-section (3), the employer shall pay, from the date on which the gratuity becomes payable to the date on which it is paid, simple interest at such rate, not exceeding the rate notified by the Central Government from time to time for repayment of long-term deposits.

15. Thus, it is apparent that under Section 7(2) of Act 1972 as soon as the gratuity becomes payable which in this case considering the provisions of Section 4(1) of the Act, 1972 would be payable on the superannuation of the petitioner, he having superannuated on 31.12.2019 and thus would fall due on 01.01.2020 the employer shall, whether an application by the person concerned has been made or not, determine the amount of gratuity and that under Section 7(3) of the Act, 1972 the

employer shall arrange to pay the amount of gratuity within 30 days from the date it becomes payable, in this case having become payable on 01.01.2020, which should have been paid by 01.02.2020.

16. From perusal of Rule 7 of Rules, 1972 it emerges that Rule 7(1) of Rules, 1972 provides that an employee who is eligible for payment of gratuity under the Act, 1972 where the date of superannuation or retirement of an employee is known may apply to the employer before thirty days of the date of superannuation or retirement.

17. The word used in Rule 7(1) of the Rules 1972 is "may" meaning thereby that it is open for the employee to either apply for payment for gratuity or not. Once Section 7(2) of Act, 1972 itself stipulates that irrespective of an employee applying for gratuity or not the gratuity would become payable and that the said amount is to be paid in terms of Section 7(3) of Act, 1972 within thirty day of the same becoming payable then irrespective of Rule 7 of the Rules, 1972 which gives a discretion to the employee concerned to apply for gratuity or not under provisions of Act, 1972 the gratuity would in fact become payable and due and thus no application in this regard would be required to be submitted by the employee.

18. Keeping in view the aforesaid discussion as well as considering the mandatory provisions of Act, 1972 it is thus apparent that gratuity became payable to the petitioner on 01.02.2020 and the same having been in fact paid to the petitioner on 03.11.2020 the petitioner would be entitled for being paid interest on delayed payment of gratuity which interest would be payable as per the provisions of Section 7(3) of Act, 1972.

19. Accordingly, the writ petition is **allowed**.

20. The respondent no. 2 i.e. the Managing Director, U.P. Forest Corporation, Lucknow is directed to pay interest as per the rate prescribed under Section 7(3) of the Act, 1972 for the period from 01.02.2020 till 03.11.2020.

21. Let the aforesaid amount be paid within a period of six weeks from the date of receipt of a certified copy of this order.

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**(2024) 11 ILRA 592**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 22.11.2024**

**BEFORE**

**THE HON'BLE SALIL KUMAR RAI, J.**

Writ A No. 5252 of 2024

**Vishal Saraswat ...Petitioner**
**Versus**
**State of U.P. & Anr. ...Respondents**

**Counsel for the Petitioner:**
Mayank

**Counsel for the Respondents:**
C.S.C., Kalyan Sundram Srivastava, Manoj Kumar Singh

**A. Service Law – Pendency of criminal proceedings - If in a criminal case the incumbent has not been acquitted and the case is pending trial, employer may well be justified in not appointing such an incumbent or in terminating his services as conviction ultimately may render him unsuitable for job and the employer is not supposed to wait till outcome of the criminal case. The decision has to be taken by the employer after considering that a**

**higher post would involve more rigorous criteria.** (Para 8)

The petitioner has been charged and put on trial in Case Crime No. 731 of 2017 registered u/Ss 498-A/323/324/504/506 of the Indian Penal Code r/w Section 3/4 of the Dowry Prohibition Act, 1961. The said case is still pending. The petitioner is already a member of the Indian Defence Estates Service (Group 'A' Gazetted Post) which is a Central Government Service. The petitioner has been selected for appointment in Provincial Civil Services (Executive) in the State of Uttar Pradesh in the examinations held in Combined State & Upper Subordinate Service Examination-2019. In his verification form, the petitioner truthfully disclosed the details of the criminal case pending against him. It be noted that the criminal case was pending against the petitioner on the date the vacancies were notified by the Uttar Pradesh Public Service Commission. (Para 7)

**B. Judicial review is permissible only to ensure that the norms prescribed for appointment are fair and reasonable and applied fairly in a non-discriminatory manner but the autonomy or choice of the public employer is greatest as long as the process of decision-making is neither illegal, unfair or lacking in bona fides.** Courts exercising the power of judicial review cannot second guess the suitability of a candidate for any public office or post. 'Absent evidence of malice or mindlessness (to the materials), or illegality by the public employer, an intense scrutiny on why a candidate was excluded as unsuitable renders the courts' decision suspect to the charge of trespass into executive power of determining suitability of an individual for appointment.' Public service-like any other, presupposes, that the State employer has an element of latitude or choice on who should enter its service. (Para 10)

**C. Distinction has to be made between judicial review and justiciability of a particular action.** Justiciability relates to a particular field falling within the purview of the power of judicial review. On account of want of judicially manageable standards, there may be matters which are not susceptible to the judicial process. In other words, during the course of exercise of the power of judicial review it may be found that there are certain aspects of the exercise of that power which are not susceptible to judicial process on account of want of judicially manageable standards and are, therefore, not justiciable. (Para 12)

**D. Two different public employers may have different views regarding the suitability of a candidate for appointment and one employer is not bound by the decision and discretion of the other employer.** (Para 13)

So far as the opinion of the appointing authority that the post of the Deputy Collector is more sensitive post than the post currently held by the petitioner under the Central Government is concerned, the comparative assessment of the sensitivities of different posts lies within the exclusive domain of the Executive and the correctness of the decision regarding the sensitivity and importance of different posts cannot be made on the basis of any judicially manageable and recognized standards. The said fact is a non-justiciable fact preventing this Court from exercising its power of judicial review. (Para 14)

**Writ Petition dismissed.** (E-4)

**Precedent followed:**

1. Joginder Singh Vs Union Territory of Chandigarh & ors., 2015 (2) SCC 377 (Para 4)

2. Avtar Singh Vs U.O.I. & ors., 2016 (8) SCC 471 (Para 4)

3. Pawan Kumar Vs U.O.I. & anr., (2022) SCC OnLine SC 532 (Para 4)

4. Satish Chandra Yadav Vs U.O.I. & anr., AIR Online 2022 SC 332 (Para 5)

5. Avtar Singh Vs U.O.I. & ors., 2016 (8) SCC 471 (Para 8)

6. State of West Bengal & ors. Vs S.K. Nazrul Islam, (2011) 10 SCC 184 (Para 8)

7. Anil Bhardwaj Vs Hon'ble High Court of Madhya Pradesh & ors., (2021) 13 SCC 323 (Para 9)

8. Commissioner of Police Vs Raj Kumar, (2021) 8 SCC 347 (Para 10)

9. Tata Cellular Vs U.O.I., (1994) 6 SCC 651 (Para 11)

10. A.K. Kaul & anr. Vs U.O.I. & anr., (1995) 4 SCC 73 (Para 12)

**Present petition assails order dated 28.02.2024, passed by the Additional Chief Secretary, Appointment Section-III, Government of Uttar Pradesh, Lucknow rejecting the claim of the petitioner for appointment on the ground of the pendency of criminal case reasoning that the post of Deputy District Magistrate is more sensitive than the post at present held by the petitioner.**

(Delivered by Hon'ble Salil Kumar Rai, J.)

1. At the behest of the sister-in-law of the petitioner, Case Crime No. 731 of 2017 under Sections 498-A / 323 / 324 / 504 / 506 of the Indian Penal Code read with Section 3/4 of the Dowry Prohibition Act, 1961 was registered against the petitioner as well as against his elder brother, father, mother and sister on 26.07.2017 and a charge-sheet has been submitted by the Investigating Officer. Charges have been framed in the said criminal case against all the accused, including the petitioner, and the trial of the case is still pending. It has been stated in the writ petition that the allegations made in the first information report are false and the attention of the Court has been drawn to the fact that the entire family of the petitioner has been implicated in the said criminal case.

2. By order dated 21.12.2020 passed by the Director, Rajya Sabha Secretariat, the petitioner was granted provisional appointment as Assistant Legislative Committee – Protocol / Executive Officer in the Rajya Sabha Secretariat. The appointment was subject to the final decision in the criminal case. The petitioner was subsequently selected in the Indian Defence Estates Service (Group 'A' Gazetted Post) under Directorate General of Defence Estates, Ministry of Defence and is presently posted as Chief Executive Officer, Roorkee Cantonment Board, Uttarakhand.

3. Meanwhile, the petitioner also applied in the Combined State & Upper Subordinate Service Examination, 2019 and was declared successful in the selection list published on 17.02.2021. The petitioner secured merit position no. 1 in the selections and was recommended by the Commission for appointment as Deputy Collector in the Provincial Civil Services (Executive). In his verification / declaration form, the petitioner disclosed the details of the criminal case pending against him. It has been stated in the petition that during the character verification of the petitioner, a report was sought by the Special Secretary, Government of Uttar Pradesh from the Rajya Sabha Secretariat and the Under Secretary, Rajya Sabha forwarded an office memorandum dated 22.06.2021 reporting that the petitioner was clear from vigilance angle and that no disciplinary case was pending against him. Still the petitioner was not issued an appointment letter by the State Government, therefore, he made several representations seeking appointment in Provincial Civil Services (Executive). By order dated 13.03.2023 passed by the Additional Chief Secretary, Appointment Section – III, Government of Uttar Pradesh, Lucknow, the representations of the petitioner were

dismissed on the ground that a criminal case of a serious nature was pending against the petitioner. The order dated 13.03.2023 was challenged by the petitioner through Writ – A No. 6206 of 2023 and this Court vide its order dated 11.04.2023 quashed the order dated 13.3.2023 and remitted back the matter to the State Government for a fresh decision. The Additional Chief Secretary, Appointment Section – III, Government of Uttar Pradesh, Lucknow vide his order dated 28.02.2024 has again rejected the claim of the petitioner again on the ground of the pendency of criminal case reasoning that the post of Deputy District Magistrate is more sensitive than the post at present held by the petitioner. The order dated 28.02.2024 has been challenged in the present writ petition.

4. It has been argued by the counsel for the petitioner that the order dated 28.02.2024 is arbitrary and discriminatory and violates Articles 14 and 16 of the Constitution of India as it is unreasonable to deny appointment to the petitioner in Provincial Civil Services (Executive) on ground of pendency of criminal case against him even though the petitioner is in employment of the Central Government in a Group - 'A' Service. It was argued that the opinion expressed in the order dated 28.02.2024 that the post of Deputy District Magistrate in state of Uttar Pradesh was more sensitive than the post presently held by the petitioner is unreasonable. It was further argued that while passing the impugned order, the Additional Chief Secretary has not considered that the criminal case registered against the petitioner arises out of a matrimonial dispute and implicates the entire family of the petitioner which by itself shows falsity of the allegations made in the First Information Report. It was argued that for the aforesaid reasons, the order dated 28.02.2024 is liable to be quashed and a direction is to be issued to the State respondents to appoint the petitioner in Provincial Civil Service (Executive) in state of Uttar Pradesh. In support of his contentions, the counsel for the petitioner has relied on the judgments of the Supreme Court in ***Joginder Singh vs. Union Territory of Chandigarh & Ors. 2015 (2) SCC 377; Avtar Singh vs. Union of India & Ors. 2016 (8) SCC 471 and Pawan Kumar vs. Union of India & Anr. (2022) SCC OnLine SC 532.***

5. Rebutting the arguments of the counsel for the petitioner, the Standing Counsel has argued that the State Government, while rejecting the claim of the petitioner, has applied its discretion in accordance with law. It was argued that the criminal case pending against the petitioner is not of trivial nature but involves serious charges under Section 498-A IPC and under Section 3/4 of Dowry Prohibition Act, 1961. It was argued that valid reasons have been given in the impugned order dated 28.02.2024 for rejecting the claim of the petitioner which are not subject to judicial review by this Court under Article 226 of the Constitution of India. It was argued that for the aforesaid reasons, the writ petition lacks merit and is liable to be dismissed. In support of his contention, the counsel for the respondents has relied on the judgment of this Court reported in ***Satish Chandra Yadav vs. Union of India and Anr. AIR Online 2022 SC 332.***

6. I have considered the submissions of the counsel for the parties.

7. The facts of the case are not in dispute. The petitioner has been charged

and put on trial in Case Crime No. 731 of 2017 registered under Sections 498-A / 323 / 324 / 504 / 506 of the Indian Penal Code read with Section 3/4 of the Dowry Prohibition Act, 1961. The said case is still pending. The petitioner is already a member of the Indian Defence Estates Service (Group 'A' Gazetted Post) which is a Central Government Service. The petitioner has been selected for appointment in Provincial Civil Services (Executive) in the State of Uttar Pradesh in the examinations held in Combined State & Upper Subordinate Service Examination - 2019. In his verification form, the petitioner truthfully disclosed the details of the criminal case pending against him. It be noted that the criminal case was pending against the petitioner on the date the vacancies were notified by the Uttar Pradesh Public Service Commission.

8. In ***Avtar Singh vs. Union of India & Ors. 2016 (8) SCC 471***, the Supreme Court held that even if the candidate has truthfully disclosed the details of the criminal case registered or pending against him, still, the employer has the right to consider his fitness for appointment and while doing so the effect of conviction and background facts of the case, nature of offence, nature of the post, etc. have to be considered. Even if the applicant is acquitted in the criminal case, the employer may consider the nature of offence, whether acquittal is honourable or has been made by giving benefit of doubt on technical grounds and the employer may decline to appoint a person who is unfit or is of dubious character. The Supreme Court further held that if ***in a criminal case the incumbent has not been acquitted and the case is pending trial, employer may well be justified in not appointing such an incumbent or in terminating his services as conviction ultimately may render him unsuitable for job and the employer is not supposed to wait till outcome of the criminal case***. It was further held by the Supreme Court that the decision had to be taken by the employer after considering that a higher post would involve more rigorous criteria. In ***Avtar Singh (supra),*** the Supreme Court referred to the judgment in ***State of West Bengal & Ors. vs. S.K. Nazrul Islam (2011) 10 SCC 184*** in which the order of the High Court directing the employer to issue appointment letter to the employee, subject to final decision in a pending criminal case was challenged by the State Government. The Supreme Court held that due to pendency of the criminal case under Sections 148 / 323 / 380 / 427 / 506 IPC, the High Court had committed an illegality in issuing a direction to appoint as till the case was pending, the employee could not have been held suitable for appointment to the post. In ***Nazrul Islam (supra),*** the Supreme Court observed that the authorities entrusted with the responsibility of appointment were under duty to verify the antecedents of the candidate to find out whether he is suitable for the post and so long as the candidate had not been acquitted in the criminal case, he could not possibly be held to be suitable for appointment to the post.

9. In ***Anil Bhardwaj vs. Hon'ble High Court of Madhya Pradesh & Ors. (2021) 13 SCC 323,*** while considering the order of the High Court refusing appointment to a judicial officer on the ground that a criminal case under Sections 498 / 406 / 34 IPC was pending during the recruitment process, the Supreme Court held that mere inclusion in the select list does not give an indefeasible right to a candidate to be appointed and the employer has a right to refuse appointment to the candidate

included in the select list on any valid ground. In ***Anil Bhardwaj (supra),*** the candidate was subsequently acquitted in the criminal case but even then the Supreme Court refused to interfere on his behalf on the ground that the subsequent acquittal was irrelevant because the applicant was acquitted after the close of recruitment process. The Supreme Court while considering the scope of judicial review in such matters held that unless the decision of the authority was arbitrary or actuated by mala fide, the decision of the appointing authority cannot be interfered with by the Constitutional Courts.

10. Similarly, the Supreme Court in ***Commissioner of Police vs. Raj Kumar (2021) 8 SCC 347*** held that courts exercising the power of judicial review cannot second guess the suitability of a candidate for any public office or post. 'Absent evidence of malice or mindlessness (to the materials), or illegality by the public employer, an intense scrutiny on why a candidate was excluded as unsuitable renders the courts' decision suspect to the charge of trespass into executive power of determining suitability of an individual for appointment.' The Supreme Court observed that public service - like any other, presupposes, that the State employer has an element of latitude or choice on who should enter its service. It was observed that judicial review is permissible only to ensure that the norms prescribed for appointment are fair and reasonable and applied fairly in a non-discriminatory manner but the autonomy or choice of the public employer is greatest as long as the process of decision-making is neither illegal, unfair or lacking in bona fides. The observations of the Supreme Court in Paragraphs - 28 and 31 are reproduced below : -

***"28. Courts exercising judicial review cannot second guess the suitability of a candidate for any public office or post. Absent evidence of malice or mindlessness (to the materials), or illegality by the public employer, an intense scrutiny on why a candidate is excluded as unsuitable renders the courts' decision suspect to the charge of trespass into executive power of determining suitability of an individual for appointment.***

...

...

...

***31. Public service - like any other, presupposes that the state employer has an element of latitude or choice on who should enter its service****. Norms, based on principles, govern essential aspects such as qualification, experience, age, number of attempts permitted to a candidate, etc. These, broadly constitute eligibility conditions required of each candidate or applicant aspiring to enter public service.* ***Judicial review, under the Constitution, is permissible to ensure that those norms are fair and reasonable, and applied fairly, in a non-discriminatory manner. However, suitability is entirely different; the autonomy or choice of the public employer, is greatest, as long as the process of decision-making is neither illegal, unfair, or lacking in bona fides."***

(emphasis supplied)

11. It has been held by the Supreme Court in its various decisions that the courts while judging the validity of executive decisions do not sit as a court of appeal but merely review the manner in which the decision was made and can only inquire as to whether the decision of the executive has been actuated by any mala fide or bias or the decision is based on irrelevant

considerations or whether relevant considerations have been ignored while taking a decision. The courts while exercising their power of judicial review also look into the question as to whether there is a proper application of mind by the concerned authority on the facts of the case. It has also been observed in different judgments that while judging the validity of the executive decisions, the courts must grant certain measure of freedom of 'play in the joints' to the executive and while exercising its power of judicial review, the constitutional courts do not substitute their own decision in place of the administrative decision. (Reference may be made to the observations in Paragraph Nos. 91 to 94 of the judgment of the Supreme Court in ***Tata Cellular vs. Union of India (1994) 6 SCC 651).***

12. At this stage, it would also be relevant to note that there may be certain actions and matters which are not susceptible to judicial process because of want of any judicially manageable standards to judge them. The correctness of such actions are also not to be judged by the Constitutional Courts in exercise of power of judicial review. In this context, it would be relevant to refer to the observations of the Supreme Court in Paragraph – 12 of its judgment in ***A.K. Kaul & Anr. vs. Union of India & Anr. (1995) 4 SCC 73*** which are reproduced below : -

*"12. It is, therefore, necessary to deal with this question in the instant case. We may, in this context, point out that a* ***distinction has to be made between judicial review and justiciability of a particular action****. In a written constitution the powers of the various organs of the State, are limited by the provisions of the Constitution. The extent of those limitations on the powers has to be determined on an interpretation of the relevant provisions of the Constitution. Since the task of interpreting the provisions of the Constitution is entrusted to the Judiciary, it is vested with the power to test the validity of an action of every authority functioning under the Constitution on the touch stone of the constitution in order to ensure that the authority exercising the power conferred by the constitution does not transgress the limitations placed by the Constitutions on exercise of that power. This power of judicial review is, therefore, implicit in a written constitution and unless expressly excluded by a provision of the Constitution, the power of judicial review is available in respect of exercise of powers under any of the provisions of the Constitution.* ***Justiciability relates to a particular field falling within the purview of the power of judicial review. On account of want of judicially manageable standards, there may be matters which are not susceptible to the judicial process. In other words, during the course of exercise of the power of judicial review it may be found that there are certain aspects of the exercise of that power which are not susceptible to judicial process on account of want of judicially manageable standards and are, therefore, not justiciable."***

(emphasis supplied)

13. The petitioner is on trial in a case which involves moral turpitude. The Additional Chief Secretary, while passing the impugned order dated 28.02.2024, has considered the fact regarding the pendency of the criminal case against the petitioner and also the claim of the petitioner that the pendency of the aforesaid criminal case could not be a legal impediment in appointing the petitioner subject to the final

decision of the trial court as was done by the Rajya Sabha Secretariat where the petitioner was appointed as Protocol / Executive Officer in the Rajya Sabha Secretariat. The petitioner also relies on the fact that he is already a member of the Group – A service under the Central Government. However, the aforesaid facts are not sufficient for this Court to hold that the appointing authority, in the present case, has wrongly exercised its discretion rejecting the claim of the petitioner. ***Two different public employers may have different views regarding the suitability of a candidate for appointment and one employer is not bound by the decision and discretion of the other employer***. The State Government cannot be saddled with the liability to mechanically and slavishly follow the decision taken by the Central Government or the Rajya Sabha Secretariat. While rejecting the claim of the petitioner, the State Government has taken note of the fact that the petitioner is a claimant for appointment on the post of Deputy Collector in the Provincial Civil Services (Executive). The appointment sought by the petitioner is on a high post, therefore, in accordance with the judgment of the Supreme Court in Avtar Singh (supra), a rigorous scrutiny regarding the suitability of the petitioner for appointment cannot be considered as an improper exercise of discretion. Further, in light of the judgment of the Supreme Court in ***Nazrul Islam (supra)***, the petitioner cannot be considered as suitable for appointment in Provincial Civil Services (Executive) till the pendency of the criminal case against him.

14. So far as the opinion of the appointing authority that the post of the Deputy Collector is more sensitive post than the post currently held by the petitioner under the Central Government is concerned, the comparative assessment of the sensitivities of different posts lies within the exclusive domain of the Executive and the correctness of the decision regarding the sensitivity and importance of different posts cannot be made on the basis of any judicially manageable and recognized standards. The said fact is a non-justiciable fact preventing this Court from exercising its power of judicial review.

15. The records available with the Court do not show any improper motive or mala fide or bias in the competent authority and any such ground has also not been pleaded by the petitioner while challenging the impugned order.

16. There is no error in the opinion of the appointing authority so as to persuade this Court to interfere under Article 226 of the Constitution of India.

17. For all the aforesaid reasons, there is no error in the impugned order dated 28.02.2024 passed by the Additional Chief Secretary, Appointment Section – III, Government of Uttar Pradesh, Lucknow.

18. The writ petition is ***dismissed.***

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**(2024) 11 ILRA 599**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 29.11.2024**

**BEFORE**

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

Writ A No. 6031 of 2024

**Rafat Naaz & Anr. ...Petitioners**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioners:**
Ishir Sripat, Siddharth Agrawal

**Counsel for the Respondents:**
C.S.C., Rakesh Kumar Yadav, Shishir Kumar Tiwari

**A. Service Law – Compassionate appointment – Succession – Indian Succession Act,1925- Section 372 - Uttar Pradesh Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974.**

**Nature of the right conferred by a succession certificate - The grant of a certificate does not establish title of the grantee as the heir of the deceased, but only furnishes him with authority to collect his debts and allows the debtors to make payments to him without incurring any risk. In order to succeed in the succession application the applicant has to adduce cogent and credible evidence in support of the application.** All that the succession certificate purports to do is to facilitate the collection of debts, to regulate the administration of succession and to protect persons who deal with the alleged representatives of the deceased persons. Such a certificate does not give any general power of administration on the eSt. of the deceased. The respondents can oppose grant of succession certificate. It is for the parties to place evidence in support of their respective claims and establish their stands. DNA test is not to be directed as a matter of routine and only in deserving cases such a direction can be given. (Para 16)

**A nomination in the service records and a succession certificate granted by the Court u/s 372 of the Indian Succession Act are at par; neither confers any beneficial interest upon the recipient of the proceeds. A person who asserts title or beneficial interest in moneys or movable property received by another under a succession certificate, or for that matter, a nomination can always institute a suit for declaration or other appropriate consequential relief in order to establish his beneficial interest or entitlement.** At the same time, **once there is a nomination left by the deceased in his service records in favour of a person, who is his wife, there is no reason for the respondents or any employer to withhold payment of the post retiral benefits in favour of the nominee in the service records.** It is for the other person, not so nominated, to establish his/her claim through suit.

In the present case, the fifth respondent is certainly not a nominee of the deceased in any of the service records. Her name does not appear in those records as the deceased's wife. Before this Court she has filed a photostat copy of a Nikahnama dated 01.05.2016 and a photostat copy of the certificate issued by the Gram Pradhan, without occasion, about the deceased and the fifth respondent living together as man and wife. (Para 19)

There is not a shred of evidence produced by the fifth respondent w.r.t. the divorce between the first petitioner and the deceased. The evidence about the fifth respondent's marriage to the deceased at this stage is not of a kind, upon which this Court in the exercise of writ jurisdiction may act to accept her case even *prima facie*, defeating the first petitioner's claim founded on a nomination entered in the service records of the deceased. Fifth respondent can establish her claim to the whole or a share of the moneys that the first petitioner would be entitled to receive on account of the nomination in her favour in the service records, by moving the competent Court of original civil jurisdiction through a suit for appropriate relief. But, respondent Nos.1, 2, 3 and 4 are not entitled to deprive the first petitioner of the post retiral benefits, regarding which there is a nomination in her favour in Rashid's service records. The fact that the nomination is there is admitted in para No.5 of the counter affidavit filed by respondent Nos.1, 2 and 3. Also, the information posted on the Manav Sampada Sansadhan Prabandhan Pranali Portal carries a nomination in favour of the first petitioner relating to the General Provident Fund, Gratuity and Pension in the event of Rashid's death and shows her relationship to Rashid as his wife. None of these postings on the official portal

disclose the fifth respondent's name, even by remote mention. (Para 20)

A mandamus is issued to respondent Nos.1 to 4 to ensure amongst themselves immediate sanction and payment of family pension and other benefits to the first petitioner. A mandamus is further issued to each of respondents to ensure amongst themselves consideration and decision of the second petitioner's claim for compassionate appointment. (Para 21)

**Writ Petition allowed.** (E-4)

**Precedent followed:**

1. Banarsi Dass Vs Teeku Dutta (Mrs) & anr., (2005) 4 SCC 449 (Para 16)

2. C.K. Prahalada & ors. Vs St. of Karn. & ors., (2008) 15 SCC 577 (Para 17)

3. Shakti Yezdani & anr.Vs Jayanand Jayant Salgaonkar & ors., (2024) 4 SCC 642 (Para 18)

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

1. The late Mohd. Rashid was appointed an Assistant Teacher in the Education Service of the State way back on 01.01.1990. He went on to hold the position of the Officiating Principal, Government Inter College, Kaulsena, Bulandshahr in course of time. He died in harness on 14.07.2020. The late Mohd. Rashid had a dependent family of five members, to wit, his wife, Rafat Naaz (petitioner No.1), three sons, namely, Mohd. Rehan Khan, Mohd. Rakib Khan, Mohd. Raza Khan (petitioner No.2) and a daughter Rafia Naaz. Rashid's death left his family, as they say, facing a huge financial crisis. They are virtually on the verge of starvation.

2. Rashid's widow, the first petitioner made an application, seeking compassionate appointment for her son, Mohd. Raza Khan, the second petitioner under the Dying-in-Harness Rules applicable. The other dependents of the deceased tendered their no objection through an affidavit dated 18.05.2021. This affidavit was submitted to the District Inspector of Schools, Bulandshahr (for short, 'the DIOS'). The District Magistrate, Bulandshahr issued a certificate dated 30.04.2021, certifying the identities of the family members of the deceased. The DIOS sent a letter dated 25.05.2021 to the first petitioner saying that the family membership certificate issued by the District Magistrate is valid for an entitlement of money up to the sum of Rs.5000/- and, therefore, the first petitioner has to get a succession certificate in her favour from the Civil Court.

3. Anjum Parveen, who claimed herself to be the second wife of the deceased Rashid, addressed a letter dated 01.06.2021 to the District Magistrate, Bulandshahr, saying that Rashid had divorced the first petitioner in the year 2015. She was no longer his wife. Anjum, who is impleaded as the fifth respondent to the writ petition, requested the District Magistrate to direct the DIOS to stop proceeding with the first petitioner's claim for release of family pension or any other fund in her favour. The DIOS addressed a letter dated 22.02.2021 to the Principal, Government Inter College, Kaulsena, Bulandshahr, saying that no document was submitted by the fifth respondent, the deceased's alleged second wife to support her claim. He further said that petitioner No.1 also failed to produce a succession certificate granted by the Civil Court. It was further remarked in his letter by the DIOS that in case within 30 days, no evidence were produced, Rashid's first wife, that is to say, the first petitioner

would have to be treated as his successor. The Principal sent a letter dated 24.02.2021, jointly addressed to the first petitioner and the fifth respondent, Anjum, saying that till date no document had been submitted by either of them in support of their respective cases. In the event no document were received within 30 days, further proceedings would have to be undertaken, treating the first petitioner to be Rashid's successor. A letter dated 06.07.2021 was then addressed by the DIOS to the first petitioner, indicating the estimated figures of post retiral benefits, payable to her, including the family pension.

4. The first petitioner appears to have instituted a petition for the grant of a succession certificate in the Court of the Civil Judge (Sr. Div.), Bulandshahr, which is numbered as Case No.83 of 2020. The fifth respondent has contested the first petitioner's case for grant of succession certificate. It is the case of the first petitioner that she is the lawfully wedded wife of Rashid, who had no other wife, besides her. He never divorced her nor he ever married Anjum. He resided with the first petitioner in the same house till his last breath. The fifth respondent had ulterior motive to come up with a baseless claim, saying that she was Rashid's second wife. The first petitioner has brought on record a host of representations that Rashid made to the Additional Director of Education, U.P., the Chief Secretary of the State, the Chief Minister and the Director of Education, dated 23.12.2016, 06.06.2018, 07.07.2018 and 02.08.2018, respectively, where he requested for a transfer to his home district as his wife, the first petitioner was suffering from cancer and he had to take care of her. It is then averred by the first petitioner that she is suffering from cancer for fifteen years past. It is also pleaded that Rashid's profile, uploaded on the Human Resource Management Portal for Government Employees *(Manav Sampada Sansadhan Prabandhan Pranali Ke Liye Kaarmik Vivaran)*, shows the first petitioner in column No.90 as Rashid's nominee to receive the proceeds of his GPF. She is described as his wife in the relationship column. Likewise, in column Nos.92 and 93, the person entitled to receive pension and gratuity, if the employee was alive, is Rashid himself and in the event of his death, it is the first petitioner, shown to be his wife. Both the post retiral benefits, that is to say, pension and gratuity have been indicated to be payable to the first petitioner in its entirety in the last column. It must be remarked that a photostat copy of the said document is on record.

5. There are then pleadings to the effect that the first petitioner and the deceased's dependents are going without any family pension and other funds for nearly four years past. They are unable to pay installments of the housing loan, the deceased had raised from the LIC Housing Finance Limited. The first petitioner is unable to pay her medical bills for the treatment of her cancer. The family are going through extreme financial hardship. The inaction of the respondents in delaying disbursement of the deceased's death-cum-retirement benefits have been castigated as serious infraction of the first petitioner's right to life and it is also said that the respondents have no right to ask the first petitioner to produce a succession certificate, which the service rules do not mandate.

6. So far as the case of the second petitioner is concerned, he claims

compassionate appointment under the Uttar Pradesh Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974 (for short, 'the Rules of 1974'), his father having died while in service. It is pleaded that the second petitioner is eligible for appointment on compassionate ground. He has made an application through proper channel within time. The respondents have been loath to consider the second petitioner's claim and their inaction calls for a direction. The family are struggling to meet their basic needs and placed in dire financial straits.

7. In the face of these facts, this writ petition has been instituted by the petitioners on two separate causes of action and for different reliefs, both arising from Rashid's untimely demise. While the first petitioner seeks a mandamus to the respondents to pay her the death-cum-retirement benefits admissible under rules by virtue of being Rashid's widow, the second petitioner seeks a direction to consider his claim for appointment to a suitable post under the Rules of 1974.

8. When this writ petition came up for admission on 22.04.2024, we directed the petitioners to implead Anjum as a party-respondent to the petition.

9. Notice was issued to respondent Nos.1 to 4 and also to Anjum. The newly added respondent was directed to be served by registered post. As it later transpired, she could not be served through registered post and the cover was returned with a remark dated 29.04.2024 that reads*: Incomplete address. Therefore, returned* (translated from Hindi into English). This Court then directed service of notice upon the fifth respondent through the learned Civil Judge (Sr. Div.), Aligarh vide order dated 29.04.2024. The learned Civil Judge (Sr. Div.), Aligarh submitted a report to the Registrar (Compliance) through the learned District Judge, Aligarh dated 09.05.2024, saying that the Process Server, who went to serve the fifth respondent, had reported that on 03.05.2024, when he went to effect service, he searched Anjum Parveen daughter of Mohd. Sharif, but her whereabouts could not be known. He, therefore, returned the process unserved. The Civil Judge too failed to secure service upon the fifth respondent. This Court vide order dated 09.05.2024 expressed our disapproval of the Process Serving Agency's slackness and issued notice to the fifth respondent to appear in person, directing the notice to be served upon her through the Chief Judicial Magistrate. The Senior Superintendent of Police was ordered to ensure that the process routed through the Chief Judicial Magistrate was duly served. The learned Chief Judicial Magistrate, Aligarh vide his report dated 16.05.2024 reported service upon the fifth respondent at the same address, where the Postal Agency and the Civil Court's Process Serving Agencies had failed with reports of ‘incomplete address’ or ‘untraceable whereabouts’. We have incorporated these details in order to emphasize the fact, though very well known, that one of the biggest challenges in the commencement of any legal proceedings before any Court, particularly when exercising civil jurisdiction or something akin to it, is effecting service upon the defendant/ respondent/ opposite party. And, even if that is accomplished, securing the said party's presence or representation in Court still poses difficulties. It is one of the biggest causes for all the Court's delays at the incipient stages of any civil proceeding. We must emphasize that the Process Serving Agency

of the District Courts, who are sufficiently staffed by trained men, need to be galvanized for effective service and Postal Agencies warned about not casually dealing with Court processes.

10. On the 17th of May, 2024, the fifth respondent appeared in person and instructed Mr. Shishir Kumar Tiwari, Advocate to appear for her. Mr. Tiwari identified her on the basis of papers produced in his chambers. Her personal appearance was exempted. He sought a short time to obtain moreful instructions on that day. On 24.05.2024, to which the cause was next adjourned, Mr. Shishir Kumar Tiwari did not appear, because the fifth respondent had changed Counsel. She had now instructed Mr. Rakesh Kumar Yadav to appear on her behalf. He sought further time to file a counter affidavit. This too is a practice prevalent amongst litigants in the State, particularly in the District Courts, where adjournments are secured by repetitively instructing new Counsel and withdrawing instructions from those earlier instructed. In this matter, this malpractice was brought to this Court, since evading the Court's process for a long time could not be managed. A counter affidavit on behalf of respondent Nos.1, 2 and 3 was filed on 09.05.2024, to which the petitioner filed a rejoinder dated 31.05.2024. A counter on behalf of respondent No.5 was filed on 29.05.2024 after service upon the petitioners. On 31.05.2024, the parties having exchanged affidavits, the petition was admitted to hearing, which proceeded forthwith. Judgment was reserved.

11. Heard Mr. Siddharth Agrawal, learned Counsel for the petitioner, Mr. Pawan Kumar Srivastava, Advocate holding brief of Mr. Rakesh Kumar Yadav, learned Counsel appearing on behalf of respondent No.5 and Mr. R.P. Dubey, learned Additional Chief Standing Counsel appearing on behalf of respondent Nos.1, 2 and 3. No one appears on behalf of respondent No.4.

12. So far as the case of the second petitioner is concerned, the relief that he seeks is simple, and, ideally speaking, should not have been combined in one petition with the first petitioner, who seeks an absolutely different relief. The second petitioner claims compassionate appointment under the Rules of 1974 on account of his father's death in harness. He prays that a mandamus be issued to the respondents to consider his claim under the Rules of 1974 as he has applied promptly and within time. He says that he is entitled. There is no contest apparently to the second petitioner's claim by the fifth respondent either. In the circumstances, there is no impediment whatsoever in issuing a direction to the DIOS to consider the second petitioner's claim, either himself if he be empowered, or cause it to be laid before the competent Authority, who would be obliged to consider and decide the same in accordance with the second petitioner's entitlement under the Rules of 1974, or whatever other rules be applicable.

13. This brings the principal issue to the fore, that is to say, the first petitioner's claim to the death-cum-retirement benefits due on account of the late Rashid's service. The fifth respondent has contested the first petitioner's claim, saying that Rashid and the first petitioner were divorced on 19.12.2015 and the fifth respondent and Rashid married according to Muslim rites on 01.05.2016. She has annexed a copy of the *Nikahnama* to the counter affidavit as Annexure No. CA-1. It is also said by the fifth respondent that she has not only

appeared in the petition for grant of a succession certificate instituted by the first petitioner before the Civil Judge (Sr. Div.), Bulandshahr, but filed her counter-claim on 16.09.2022. She has asserted herself to be the lawfully wedded wife of the late Rashid, claiming a marriage for herself, that was solemnized after the deceased's divorce with the first petitioner. The fifth respondent has asserted that she has no children and lives by herself. She has no source of income of her own. She is entitled to receive the General Provident Fund, Group Insurance, Gratuity and Pension, and not the first petitioner, as she is a divorced wife of the deceased. The fifth respondent has also produced and annexed to the counter affidavit a photostat copy of the certificate dated 28.10.2022 from the Village Pradhan, Gram Panchayat, Hathmabad, Block and District Bulandshahr, saying that Rashid, who was the Headmaster of the Government Inter College, Kaulsena, lived on rent in the house of Prabha Gupta daughter of Ved Prakash Gupta, because the College was close-by, located at a distance of one kilometer. It is also said that the fifth respondent, Smt. Anjum wife of Rashid and Rashid would stay happily together in the said house. The Village Pradhan has said that she knew both the husband and wife very well and so did other natives of the village. The certificate is also signed by some other members of the Gram Sabha.

14. The stand taken in the counter affidavit filed by respondent No.1, 2 and 3 is that in the late Rashid's GPF Passbook, the name of his wife recorded is that of the first petitioner. It is then emphasized that on 11.09.2020 when the matter relating to family pension and retiral dues was sent for verification to the Finance and Accounts Officer, Secondary Education in the office of the DIOS, he scrutinized the matter and by his report dated 11.09.2020 opined that the parties be required to submit a succession certificate granted by the Court of competent jurisdiction. On the basis of the report of the Finance and Accounts Officer, the DIOS vide letter dated 16.09.2020 directed the Principal of the Institution to obtain a succession certificate from both the adversely claiming parties. In compliance with the letter of the DIOS, the Principal of the Institution addressed a letter dated 20.09.2020, both to the first petitioner and the fifth respondent to submit certificates of succession obtained from the Court of competent jurisdiction. The further plea taken by the DIOS is that none of the parties have submitted a succession certificate from the Court of competent jurisdiction, as a result of which, none of them could be given family pension and other death-cum-retirement benefits, such as, G.P.F., Gratuity, Group Insurance due on account of the deceased, Mohd. Rashid's services.

15. Upon a careful consideration of the matter, what this Court finds is that while neither we nor the respondent Education Authorities, who hold funds of the deceased in trust for his lawful successors can decide, who that successor is, as between the first petitioner and the fifth respondent, the settled position of the law is that these benefits must be given to the nominee in the service records. The insistence by the DIOS and the other Education Authorities upon the first petitioner or the fifth respondent securing a succession certificate is of no consequence. A succession certificate even if granted in favour of the first petitioner, or for that matter, the fifth respondent does not create any beneficial interest in the funds or moneys paid to either of them by the

respondent Authorities. A succession certificate gives valid discharge to a third party, who holds funds for another, no more in the mortal world, by certifying the person entitled to receive the funds or moneys or other movable properties owned by the deceased. It does not declare title for the person in whose favour the succession certificate is issued. The holder of a beneficial interest in movable property or money received under a succession certificate would have to establish it, if he is a person, other than the holder of the certificate, by establishing that right in a duly constituted suit. A petition for succession is by no means a suit; nor the succession certificate a decree, declaring title or beneficial interest in favour of the one, who holds it.

16. In this connection, reference may be made to **Banarsi Dass v. Teeku Dutta (Mrs) and another, (2005) 4 SCC 449.** The question involved in the appeal by special leave in **Banarsi Dass** *(supra)* before their Lordships was if a DNA Test could be directed in proceedings for grant of a succession certificate under Section 372 of the Indian Succession Act. Dwelling upon the nature of the right conferred by a succession certificate, it was held:

"14. The main object of a succession certificate is to facilitate collection of debts on succession and afford protection to the parties paying debts to the representatives of deceased persons. All that the succession certificate purports to do is to facilitate the collection of debts, to regulate the administration of succession and to protect persons who deal with the alleged representatives of the deceased persons. Such a certificate does not give any general power of administration on the estate of the deceased. The grant of a certificate does not establish title of the grantee as the heir of the deceased. A succession certificate is intended as noted above to protect the debtors, which means that where a debtor of a deceased person either voluntarily pays his debt to a person holding a certificate under the Act, or is compelled by the decree of a court to pay it to the person, he is lawfully discharged. The grant of a certificate does not establish a title of the grantee as the heir of the deceased, but only furnishes him with authority to collect his debts and allows the debtors to make payments to him without incurring any risk. In order to succeed in the succession application the applicant has to adduce cogent and credible evidence in support of the application. The respondents, if they so choose, can also adduce evidence to oppose grant of succession certificate. The trial court erroneously held that the documents produced by the respondents were not sufficient or relevant for the purpose of adjudication and DNA test was conclusive. This is not a correct view. It is for the parties to place evidence in support of their respective claims and establish their stands. DNA test is not to be directed as a matter of routine and only in deserving cases such a direction can be given, as was noted in Goutam Kundu case [(1993) 3 SCC 418 : 1993 SCC (Cri) 928] . Present case does not fall in that category. The High Court's judgment does not suffer from any infirmity. We, therefore, uphold it. It is made clear that we have not expressed any opinion on the merits of the case relating to succession application."

(emphasis by Court)

17. To the same effect are remarks of the Supreme Court in **C.K. Prahalada and others v. State of Karnataka and others, (2008) 15 SCC 577. In C.K. Prahalada** *(supra)*, it has been held:

"17. A succession certificate is granted for a limited purpose. A court granting a succession certificate does not decide the question of title. A nominee or holder of succession certificate has a duty to hand over the property to the person who has a legal title thereto. By obtaining a succession certificate alone, a person does not become the owner of the property."

18. These decisions more or less spell out the nature of rights created in favour of the recipient of a succession certificate under Section 372 of the Indian Succession Act. So far as the rights created by nomination in favour of a nominee are concerned, these have been considered under various statutes by the Supreme Court in **Shakti Yezdani and another v. Jayanand Jayant Salgaonkar and others, (2024) 4 SCC 642.** In **Shakti Yezdani** *(supra),* the following remarks of their Lordships elucidate the matter:

"40. In an illuminating list of precedents, this Court as well as several High Courts have dealt with the concept of "nomination" under legislations like the Government Savings Certificates Act, 1959, the Banking Regulation Act, 1949, the Life Insurance Act, 1939 (quaereInsurance Act, 1938) and the Employees' Provident Fund and Miscellaneous Provisions Act, 1952. It would be apposite to refer to what the Court said on nomination, in reference to these legislations:

| *Case Law/Precedent* | *Held* |
|---|---|
| Sarbati Devi v. Usha Devi [Sarbati Devi v. Usha Devi, (1984) 1 SCC 424] | Nomination under Section 39 of the Insurance Act, 1938 is subject to the claim of heirs of the assured under the law of succession. |
| *Nozer Gustad Commissariat v. Central Bank of India [Nozer Gustad Commissariat v. Central Bank of India,* 1992 SCC OnLine Bom 481 : (1993) 1 Mah LJ 228] | Nomination under Section 10(2) of the EPF & Miscellaneous Provisions Act, 1952 cannot be made in favour of a non-family person. Relied upon *Sarbati Devi [Sarbati Devi v. Usha Devi,* (1984) 1 SCC 424] to state that the principles therein were applicable to the Employees Provident Funds Act as well and not merely restricted to the Insurance Act. |
| *Vishin N. Khanchandani v. Vidya Lachmandas Khanchandani [Vishin N. Khanchandani v. Vidya Lachmandas Khanchandani*, (2000) 6 SCC 724] | Nominee entitled to receive the sum due on the savings certificate under Section 6(1) of the Govt. Savings Certificates Act, 1959, but cannot utilise it. In fact, the nominee may retain the same for those entitled to it under the relevant law of succession. |
| *Ram Chander Talwar v. Devender Kumar Talwar [Ram Chander Talwar v. Devender Kumar Talwar*, (2010) 10 SCC 671 : (2010) 4 SCC (Civ) 313] | Nomination made under the provisions of Section 45-ZA of the Banking Regulation Act, 1949 entitled the nominee to receive the deposit amount on the death of the |

| | |
|---|---|
| | depositor. |

41. A consistent view appears to have been taken by the courts, while interpreting the related provisions of nomination under different statutes. It is clear from the referred judgments that the nomination so made would not lead to the nominee attaining absolute title over the subject property for which such nomination was made. In other words, the usual mode of succession is not to be impacted by such nomination. The legal heirs therefore have not been excluded by virtue of nomination."

19. In substance, a nomination in the service records and a succession certificate granted by the Court under Section 372 of the Indian Succession Act are at par; neither confers any beneficial interest upon the recipient of the proceeds. As already said, a person who asserts title or beneficial interest in moneys or movable property received by another under a succession certificate, or for that matter, a nomination can always institute a suit for declaration or other appropriate consequential relief in order to establish his beneficial interest or entitlement. At the same time, once there is a nomination left by the deceased in his service records in favour of a person, who is his wife, there is no reason for the respondents or any employer to withhold payment of the post retiral benefits in favour of the nominee in the service records. It is for the other person, not so nominated, to establish his/ her claim through suit. As already said, here the fifth respondent is certainly not a nominee of the deceased in any of the service records. Her name does not appear in those records as the deceased's wife. Before this Court she has filed a photostat copy of a *Nikahnama* dated 01.05.2016 and a photostat copy of the certificate issued by the Gram Pradhan, without occasion, about the deceased and the fifth respondent living together as man and wife.

20. So far as divorce between the first petitioner and the deceased goes, there is not a shred of evidence produced by the fifth respondent. The evidence about the fifth respondent's marriage to the deceased at this stage is not of a kind, upon which this Court in the exercise of writ jurisdiction may act to accept her case even *prima facie*, defeating the first petitioner's claim founded on a nomination entered in the service records of the deceased. We do not wish to say that the fifth respondent cannot establish her claim at all to the whole or a share of the moneys that the first petitioner would be entitled to receive on account of the nomination in her favour in the service records. She can do that by moving the competent Court of original civil jurisdiction through a suit for appropriate relief. She can also seek appropriate interim injunctions/ interim orders. But, so far as respondent Nos.1, 2, 3 and 4 are concerned, they are not entitled to deprive the first petitioner of the post retiral benefits, regarding which there is a nomination in her favour in Rashid's service records. The fact that the nomination is there is admitted in paragraph No.5 of the counter affidavit filed by respondent Nos.1, 2 and 3. Also, the information posted on the *Manav Sampada Sansadhan Prabandhan Pranali Portal* carries a nomination in favour of the first petitioner relating to the General Provident Fund, Gratuity and Pension in the event of Rashid's death and shows her relationship to Rashid as his wife. None of these postings on the official portal disclose the fifth respondent's name, even by remote mention.

21. In the circumstances, this writ petition succeeds and is **allowed.** A *mandamus* is issued to respondent Nos.1, 2, 3 and 4 to ensure amongst themselves immediate sanction and payment of family pension to the first petitioner, including arrears, General Provident Fund, Gratuity, Dues on account of Leave Encashment, Group Insurance and any other death-cum-retirement benefit, admissible under the Rules. A *mandamus* is further issued to each of respondent Nos.1, 2, 3 and 4 to ensure amongst themselves consideration and decision of the second petitioner's claim for compassionate appointment in accordance with rules within a period of eight weeks of the receipt of a copy of this order.

22. Let a copy of this judgment be communicated to the Additional Chief Secretary, Ministry of Education, Government of U.P., Lucknow through Civil Judge (Sr. Div.), Lucknow and the District Inspector of Schools, Bulandshahr, the Principal, Government Inter College, Kaulsena, District Bulandshahr through Civil Judge (Sr. Div.), Bulandshahr by the Registrar (Compliance).

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**(2024) 11 ILRA 609**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 22.11.2024**

**BEFORE**

**THE HON'BLE RAJAN ROY, J.**
**THE HON'BLE OM PRAKASH SHUKLA, J.**

Writ A No. 7862 of 2023

**Punita Bhatt @ Punita Dhawan ...Petitioner**
**Versus**
**B.S.N.L. New Delhi & Ors. ...Respondents**

**Counsel for the Petitioner:**
Pankaj Kumar Tripathi, Bhavini Upadhyay, Sandhya Dubey

**Counsel for the Respondents:**
Pratul Kumar Srivastava, Gyanendra Singh Sikarwar

**A. Service Law – Compassionate Appointment – Constitution of India,1950 - Articles 14, 15, 16 - Uttar Pradesh Recruitment of Dependents of Government Servant (Dying in Harness) Rules, 1974 - Rule 2(c) - Non- inclusion of a "married daughter" in the definition of a "family", Rule 2 (c) of the Rules, 1974, and in the note below the regulation 104 of the 1975 Regulations, thereby denying her the opportunity of being considered for compassionate appointment, even though, she was dependent on the government servant at the time of his death, is discriminatory and is in violation of Article 14, 15 and 16 in Part III of the Constitution of India and as such read down the said definition of "family" in Rule 2 (c) of the Rules, 1974, and in the note below the regulation 104 of the 1975 Regulations, to save it from being held unconstitutional.** (Para 27)

**High Courts have given purposive and expansive interpretation to the meaning of the term 'family member' and included even married daughters within the meaning of family of dependent. If a married son is eligible for compassionate appointment if he was dependent upon his father at the time of his death unless he had his own means of livelihood, then, there is no reason as to why a married daughter who is similarly placed, under the aforesaid scheme. Any distinction in this regard would be without any reasonable basis and without any link to the object sought to be achieved, therefore, it would be discriminatory and hit by Article 14 of the Constitution.** (Para 29, 31)

A scheme dated 09.10.1998 has been adopted by BSNL, in order to bring uniformity and

transparency in the matter of compassionate appointment and a weightage system has been introduced vide Corporate Office Order dated 27.06.2007. (Para 30)

The word 'daughter' used in the scheme is not preceded by the word 'unmarried' just as the word 'son' used in the scheme is not preceded by the word 'unmarried'. The absence of such prefix gives a reasonable basis to conclude that this definition does not exclude a 'married daughter', especially as the definition is an inclusive one, therefore, it has to be given an expansive meaning keeping in mind the object sought to be achieved. Although the word 'unmarried daughter' has been used in the proforma documents annexed with O.M. dated 27.06.2007 by which weightage point system was introduced but O.M. cannot supplant the substantive provision contained in the scheme dated 09.10.1998 as the weightage point system merely provides a procedure and is not the substantive provision. Even otherwise, the word unmarried daughter used in the documents annexed with the aforesaid O.M. would not be sustainable in view of the decisions referred. **Any action/clauses of the policy which deprives a widowed daughter from a right of consideration for compassionate appointment if she was dependent upon her father, the deceased employee would run contrary to Article 14, 15, 16 read with 39A of the Constitution of India.** (Para 31)

Therefore, it is held that the words 'daughter (including adopted daughter)' occurring in Note-I of the Guidelines dated 09.10.1998 includes a married daughter, the only caveat is that such married daughter should be dependent upon her father/mother on the date of his/her death. (Para 32)

**B. The question of dependency is one of fact which is to be determined by the authorities. If widowed daughter was not dependent upon her father then she would not be entitled to compassionate appointment under the guidelines.** Consequently, a 'widowed daughter' would be covered in the definition of 'daughter' contained in Note-I of the Guidelines dated 09.10.1998 if she was dependent upon her deceased father or mother on the date of his/her death. (Para 35)

**A 'widowed daughter' stands on a better footing than a married daughter** as, *prima facie* with the loss of her husband, she also loses her source of livelihood unless of course in the facts of a given case it is found that she is herself employed or has other means of sustenance which are adequate to sustain her in which case she may not have been dependent upon her father, but, unless this is proved, it would be reasonable to draw an inference that she was dependent upon her father unless of course there is evidence to the contrary. (Para 33)

Even after marriage as also after her widowhood, she continues to be his daughter and her status as such continues even at the time of death of her father. Her widowhood occurred prior to the death of her father, therefore, she was for all legal and practical purposes daughter of late Om Prakash Bhakta although a widowed daughter, on the date of his death. (Para 34)

**C. Words and Phrases – *"dependent"* -** a spouse/son/unmarried or widowed daughter/adopted son/adopted unmarried daughter legally adopted by the deceased government servant during his/her lifetime and who were wholly dependent on the deceased government servant at the time of his/her death. The said definition was amended w.e.f. 28.10.2021, wherein it included **married daughter** in the said definition but with certain conditions. The Rajasthan High Court after examining various judgments passed by different High Court held that the use of word "unmarried" and Rule 2(c) after of the Rules, 1996, deprived a married daughter from right of consideration for compassionate appointment, violates the equality clause and cannot be countenanced. (Para 28)

**Writ petition allowed**. (E-4)

**Precedent followed:**

1. Vineeta Sharma Vs Rakesh Sharma, AIR 2020 SC 3717 (Para 7)

2. Uttar Pradesh Power Corporation Ltd. Vs Smt. Urmila Devi, (2011) SCC OnLine All 152 (Para 7)

3. Sunita Vs U.O.I., (1996) 2 SCC 380 (Para 15)

4. Smt. Vimla Srivastava Vs St. of U.P. & anr., (2015) SCC OnLine All 6776 (Para 17)

5. Smt. Neha Srivastava Vs St. of U.P. & anr., Special Appeal Defective No. 863 of 2015, decided on 23.12.2015) (Para 18)

6. Meenakshi Dubey Vs Madhya Pradesh Poorv Chhetra Vidut Vitran Company Ltd., (2020) SCC OnLine MP 383 (Para 20)

7. St. of West Bengal & ors. Vs Purnima Das & ors., 2018 Lav I.C. 1522 (Para 21)

8. Uddham Singh Nagar District Cooperative Bench Ltd. & ors. Vs Anjula Singh & ors., AIR 2019 UTR 69 (Para 23)

9. R. Jayammo Vs Karnataka Electricity Board & anr., LR 1992 KAR 3416 (Para 24)

10. R Govindmmal Vs Principal Secretary, Social Welfare and Nutritious Meal Program Department, (2015) 3 LW 756 (Para 25)

11. Sou. Swara Sachin Kulkarni Vs Superintending Engineer Pune Irrigation Project Circle & ors., 2013 SCC Online BOM 1549 (Para 26)

12. Devarshi Chakroverty Vs St. of Tripura & ors., 2020 IGLT 198 (Para 27)

13. Manjula Vs St. of Karn., (2005) 104 FLR 271 (Para 27)

14. Priyanka Shrimali Vs St. of Raj., 2022 SCC Online RAJ 1479 (Para 28)

**Present petition challenges the judgment and order dated 13.01.2023, passed by the Central Administrative Tribunal, Lucknow Bench (hereinafter referred to as 'the Tribunal'), whereby Original Application No. 332/00/123/2017 filed by the petitioner claiming compassionate appointment on the basis of being widow daughter has been dismissed.**

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

(1) Heard Sri Pankaj Kumar Tripathi, learned Counsel for the petitioner and Sri Pratul Kumar Srivastava, learned Counsel for the respondents.

(2) By means of this petition, the petitioner has challenged the judgment and order dated 13.01.2023 passed by the Central Administrative Tribunal, Lucknow Bench (hereinafter referred to as **'the Tribunal'**), whereby Original Application No. 332/00/123/2017 filed by the petitioner claiming compassionate appointment on the basis of being widow daughter has been dismissed. In addition, the petitioner is also challenging the direction/instructions issued by the Assistant General Manager (Recruitment), Bharat Sanchar Nigam Limited, Telecom (East), U.P. Circle, Lucknow (respondent No.2) to the effect that widow daughter of the deceased employee cannot claim compassionate appointment.

(3) Brief facts of the case are that the petitioner is a widowed daughter. Her father, namely, Om Prakash Bhakta, while working on the post of T.O.A. (T.L.) in the office of General Manager (Telecom), died in harness on 12.11.2011, leaving behind wife (Smt. Saraswati Devi), four daughters including the petitioner and a son.

(4) On 01.06.2016, the petitioner moved an application seeking appointment on compassionate ground. Along with the application, the petitioner had also submitted notary affidavits of her mother, brother and married sisters to the effect that if the petitioner is given appointment on compassionate ground, they will have no objection rather they have given their consent to give appointment to the

petitioner. According to the petitioner, she has also given a notary affidavit to the effect that she was married with Late Manish Dhawan who died on 27.07.2009 and after death of her husband, she was living with her father along with her minor son and further if she is given appointment on a suitable post, she will look after the heirs of her deceased father as per the best of her capability and further that she is Graduate and also has a Library Science Certificate.

(5) Apparently, vide letter dated 13.10.2016, the Assistant General Manager (HR), Office of General Manger (Telecom), Allahabad intimated to the petitioner that as widowed daughter is not listed in the eligibility criteria of the guidelines circulated by its Circle Office, therefore, no action on her application for compassionate appointment is required to be taken.

(6) Feeling aggrieved, the petitioner preferred an Original Application No. 332/00/123/2017 before the Tribunal. The Tribunal, after appreciating the claim of the petitioner as also appraising the guidelines/schemes issued by the Bharat Sanchar Nigam Limited for compassionate appointment as well as judgment of this Court passed in Special Appeal No. 1026 of 2003 : *U.P. Power Corporation Ltd. Vs. Smt. Urmila Devi,* has returned a finding that as per the guidelines, widowed daughter is not enumerated in the list of eligible persons and the Tribunal cannot enter into the shoes of the Executive in framing of rules and guidelines. In this backdrop, the Tribunal has dismissed the original application vide judgment and order dated 13.01.2023, which has led to filing of the present writ petition.

(7) The submission of the learned Counsel for the petitioner was two fold; firstly, as a widowed daughter she did not lose the status of being a 'daughter' of her father/parent and after death of her husband she was dependent upon her father for subsistence, as such, she would come under the definition of family. In this regard, learned Counsel has placed reliance upon the judgment of the Apex Court rendered in the case of **Vineeta Sharma vs. Rakesh Sharma** : AIR 2020 SC 3717 and **Uttar Pradesh Power Corporation Ltd. vs. Smt. Urmila Devi :** (2011) SCC OnLine All 152. Secondly, petitioner's case was never placed before the Circle High Power Committee as mandated by guidelines of the respondents.

(8) *Per contra,* learned Counsel for the respondents argued that the impugned order passed by the Bharat Sanchar Nigam Limited (hereinafter referred to as **"BSNL"**) is based on Note '1' of Memorandum dated 09.10.1998, by virtue of which, the meaning of 'Dependent Family Member' as per the Scheme for Compassionate Appointment under The Central Government (hereinafter referred to as **"the Scheme"**) issued by Department of Personnel Training (DoPT) is mentioned, wherein a 'widow daughter' of deceased employee is not included as 'Dependent Family Member' of the deceased employee. It is also submitted that this Court or the Tribunal cannot include a widow within the definition of 'Dependent Family Member' when the Policy decision on the subject does not include her. Thus, his submission was that learned Tribunal has passed a reasoned order which does not call for any interference.

(9) Having regard to the submissions advanced by the learned Counsel for the

parties and going through the record available before this Court in the instant writ petition, what this Court finds is that the bone of contention between the parties is as to whether a "widow daughter" of a deceased employee is a 'Dependent Family Member' or not, so as to be eligible for appointment on compassionate ground. The point to be seen by this Court is as to whether a "widow daughter" falls under the definition of 'Dependent Family Members' or not as per the Scheme of the Compassionate Appointment.

(10) Evidently, the Guidelines for Compassionate Appointment issued by the Government of India, Ministry of Personnel Public Grievance and Pension (DoPT) vide Office Memorandum dated 09.10.1998 states that the Scheme for Compassionate Appointment is applicable to a 'Dependent Family Member. Point No.2 of Note-1 of the Scheme For Compassionate Appointment, says that a 'Dependent Family Member' means :-

"(a) Spouse, or

(b) Son (including adopted son), or

(c) Daughter (including adopted daughter), or

(d) Brother or the sister in the case of an unmarried government servant."

(11) Apparently, the respondents-BSNL relying on the aforesaid Note-1 i.e. the meaning of 'Dependent Family Member' has denied compassionate appointment to the petitioner on the ground that "widow daughter" is not mentioned at point No.(c), which merely contains the word "daughter (including adopted daughter)".

(12) The prerequisites to be satisfied for being entitled for consideration for such appointment are that the applicant should be a family member and should be dependent upon the deceased employee. After these conditions are satisfied the economic or financial condition of the family, including the dependent, assumes significance, and is required to be assessed.

(13) In the facts of this case, it is not in dispute that the petitioner is the daughter of the deceased employee, however, she was married and became a widow prior to the death of her father, the deceased employee. It is this fact which is coming in the way of her consideration for compassionate appointment as, according to respondents a widowed daughter is not included in the guidelines dated 09.10.1998.

(14) As per the Office Memo dated 09.10.1998 of Department of Personnel and Training, Government of India and the scheme for compassionate appointment appended thereto which has been adopted and is applicable in the opposite party-corporation, the object of the scheme is to grant appointment on compassionate ground to a dependent family member of an employee dying-in-harness or who is retired on medical grounds, thereby leaving his family in penury and without any means of livelihood, to relieve the family of an employee from financial destitution and to help it to get over the emergency.

(15) It is not in dispute that the scheme is applicable in the opposite party-corporation and was applicable to *'dependent family member'* of a deceased employee. The bone of contention is as to whether the petitioner who was the married daughter and unfortunately became a widow prior to the death of the deceased government servant, is covered by the scheme or not. As per Note-1 of the

scheme, the words 'dependent family member' has been defined. As per clause (c) thereof, definition of 'daughter' is an inclusive one which includes 'adoptive daughter'. The foremost question is as to whether the petitioner was daughter of the deceased employee on the date of his death or not in terms of this definition. The fact that she was born out of the wedlock of her parents one of whom was the deceased employee i.e. her father is not in dispute. Even after her marriage, she continued to be daughter of her father i.e. late Om Prakash Bhakta and there cannot be any dispute regarding her status as such. In the case of **Sunita vs. Union of India** reported in (1996) 2 SCC 380, Hon'ble the Supreme Court succinctly summarized the status of a daughter vis-a-vis other relatives in the following words :-

***'A son is a son until he gets a wife. A daughter is a daughter throughout his life'.***

(16) The entitlement of a married daughter to be considered for compassionate appointment has been considered by this High Court as well as Hon'ble the Supreme Court and, the relevant rules pertaining to the Government of U.P. which are quite similar to the guidelines dated 09.10.1998, have been interpreted so as to include a 'married daughter' within the definition of 'daughter' contained therein. Subsequently, these Rules have even been amended in the light of these pronouncements.

(17) We may in this regard refer to a decision of a Division Bench of this Court in **Smt. Vimla Srivastava vs. State of U.P. and Another : (2015) SCC OnLine All 6776**, which has considered the eligibility of "married daughters" for compassionate appointment under the "Uttar Pradesh Recruitment of Dependents of Government Servant (Dying in Harness) Rules, 1974 (hereinafter referred to as "Rules, 1974")". The learned Division Bench, while considering Rule 2(c) of the Rules, 1974, which relates to definition of ‘family’ and sub-rule 2(c)(iii), which relates to "daughter" and inter-alia contained a term "unmarried daughters", "married adopted daughter", "widow daughter" and "widowed daughter-in-law" within its fold but did not mention "married daughter", went on to hold that the exclusion of married daughters from the ambit of the expression "family" in Rule 2(c) of the Rules, 1974, is illegal and unconstitutional, being violative of Article 14 and 15 of the Constitution of India and accordingly, the word 'unmarried' in sub-rule 2(c)(iii) of the Rules, 1974 was struck down by the learned Division Bench after recording various precedents.

(18) The decision of the learned Division Bench of this Court in **Smt. Vimla Srivastava (supra)** was followed by another Bench of this Court in **Smt. Neha Srivastava vs. State of U.P. and Another** (Special Appeal Defective No.863 of 2015, decided on 23.12.2015). The special leave petition filed against the said order has been dismissed vide order dated 23.07.2019 passed in Special Leave to Petition (Civil) No.22646 of 2016.

(19) Thus, it is seen from the aforesaid judgment of this Court that although "unmarried daughters", "married adopted daughters", "widowed daughters", and "widowed daughter-in-law" were mentioned to mean a dependent of a family, however, the learned Division Bench of this Court giving an expansive and inclusive interpretation of the meaning

of 'family' also included "married daughter" within its fold as dependent.

(20) A Full Bench of the Madhya Pradesh High Court in the case of **Meenakshi Dubey vs. Madhya Pradesh Poorv Chhetra Vidut Vitran Company Ltd.** : (2020) SCC OnLine MP 383, also upheld the right of the "married daughter" to claim appointment on compassionate grounds. The Full Bench, after tracing the development of history on the said proposition of law, has held that Clause 2.2 of the State Policy, which deprives 'married daughter' of the deceased employee from right to consideration to claim compassionate appointment is violative of Article 14, 16 and 39 (a) of Constitution of India. The Full Bench has further held that a women citizen cannot be excluded for any appointment on compassionate appointment basis on the grounds of sex alone and a daughter even after marriage remains part of the family of deceased employee and she could not be treated as not belonging to her father's family and criteria for compassionate appointment should be dependency rather than marriage.

(21) Similar question came up for consideration before a Larger Bench of High Court of Calcutta in State of **West Bengal and Others Vs. Purnima Das and Others : 2018 Lav I.C. 1522,** wherein the relevant Clause 2(2) of the policy, which was subject matter of examination, was:-

*"2(2). For the purpose of appointment on compassionate ground, a dependent of a government employee shall mean wife/ husband/ son/ unmarried daughter of the employee who is/was solely dependent on the government employee.*

*The substantial question to be decided by the Larger Bench was whether the classification created by Government by depriving the married daughter from right of consideration for compassionate appointment is a valid classification. Dipankar Dutta Justice speaking for the Bench opined as under:-*

*"...We are inclined to hold that the purpose of scheme for compassionate appointment every such member of a family of the government employee who is dependent of the earning of such employee for his or her survival must be considered to belong to a up 'class'. Exclusion of any member of a family on the ground that he/she is not so dependent could be justified, but certainly not on the grounds of gender or marital status. If so permitted, a married daughter who stand deprived of the benefit that a married son would be entitled under the scheme. A married son and a married daughter may appear to constitute different classes but when a claim for compassionate appointment is involved, they have to be treated equally and at par if it is demonstrated that both depended on the earning of their deceased father/mother (government employee) for their survival. It is, therefore, difficult for us to sustain the classification as reasonable."*

(22) Consequently, the Larger Bench has held that the adjective 'unmarried' before daughter, is stuck down as violative of the Constitution. The judgment of **Purnima Das (supra)** etc., was unsuccessfully challenged by the State of West Bengal before the Hon'ble Supreme Court in SLP (Civil) No.17638-17639 of 2018 which were also dismissed on 23.07.2019.

(23) Similar question came up for consideration before a Larger Bench of High Court of Uttarakhand in the case of **Uddham Singh Nagar District Cooperative Bench Ltd. and Others Vs. Anjula Singh and Others :**AIR 2019 UTR 69, wherein the question posed before the Larger Bench was to whether non-inclusion of a "married daughter" in the definition of "family", under Rule 2 (c) of the Rules, 1974, and in the note below the Regulation 104 of the 1975 Regulations, is discriminatory, and is in violation of Article 14, 15 and 16 in part-III of the Constitution of India. The Larger Bench, after recording various precedents, governing the field went on to hold that non-inclusion of a "married daughter" in the definition of a "family", Rule 2 (c) of the Rules, 1974, and the note below of the regulation 104 of the 1975 Regulations, thereby denying her the opportunity of being considered for compassionate appointment, even though, she was dependent on the Government Servant at the time of his death, is discriminatory and is in violation of Article 14, 15 and 16 in Part -III of the Constitution of India.

(24) It is noteworthy that similar view has been taken by Hon'ble Karnataka High Court in **R Jayammo Vs. Karnataka Electricity Board and Another** : ILR 1992 KAR 3416. In the said case, it has been held :-

*"10. This discrimination in refusing compassionate appointment on the only ground that the woman is married is violative of constitutional guarantees. It is out of keeping with the trend of times when men and women compete on equal terms in all areas. The electricity Board would do well to revive its guidelines and remove such anachronism."*

(25) The Madras High Court in **R Govindmmal Vs. Principal Secretary, Social Welfare and Nutritious Meal Program Department** : (2015) 3 LW 756 opined thus :-

*"Therefore, I am of the view that G.O.M.S No.560 dated 03.08.1977, depriving compassionate appointment to married daughters while married sons are provided compassionate appointment, is unconstitutional. In fact, the State can make law providing certain benefits exclusively for women and children as per Article 15 (3) of the Constitution of India. But the State cannot discriminate women in the matter of compassionate appointment, on the ground of marriage."*

(26) The Hon'ble Bombay High Court in **Sou. Swara Sachin Kulkarni Vs. Superintending Engineer Pune Irrigation Project Circle and Others** : 2013 SCC Online BOM 1549 opined that the stand of the State that married daughter will not be eligible or cannot be considered for compassionate appointment violates the mandate of Article 14, 15 and 16 of the Constitution of India. No discrimination can be made in public employment on gender basis. If the object sought can be achieved is assisting the family in financial crisis by giving employment to one of the dependents, then undisputedly in the case, the daughter was dependent on the deceased and his income till her marriage. Thus, the Court did not find any rationale for this classification and discrimination being made in matters of compassionate appointment and particularly when the employment was sought under the State.

(27) To the same extent, the judgment by High Court of Tripura in **Devarshi Chakroverty Vs. State of Tripura and**

**Others :** 2020 1GLT 198, wherein the Court took note of the various judgments of High Courts including the judgment of Allahabad High Court in Vimla Srivastava (supra) and judgment of Karnataka High Court in ***Manjula Vs. State of Karnataka reported in (2005) 104 FLR 271*** and has held that non-inclusion of a "married daughter" in the definition of a "family", Rule 2 (c) of the Rules, 1974, and in the note below the regulation 104 of the 1975 Regulations, thereby denying her the opportunity of being considered for compassionate appointment, even though, she was dependent on the government servant at the time of his death, is discriminatory and is in violation of Article 14, 15 and 16 in Part III of the Constitution of India and as such read down the said definition of "family" in Rule 2 (c) of the Rules, 1974, and in the note below the regulation 104 of the 1975 Regulations, to save it from being held unconstitutional.

(28) Further, Full Bench of Rajasthan High Court in the case of ***Priyanka Shrimali vs. State of Rajasthan*** : 2022 SCC Online RAJ 1479 was tasked upon to interpret Rule 2(c) of Rajasthan Compassionate Appointment of Dependents of Deceased Government Servants Rules, 1996 (hereinafter referred to as the **"Rules, 1996")** which describes the meaning of "dependent" to be a spouse/son/unmarried or widowed daughter/adopted son/adopted unmarried daughter legally adopted by the deceased government servant during his/her lifetime and who were wholly dependent on the deceased government servant at the time of his/her death. The said definition was amended w.e.f. 28.10.2021, wherein it included married daughter in the said definition but with certain conditions. The Rajasthan High Court after examining various judgments passed by different High Court held that the use of word "unmarried" and Rule 2 (c) after of the Rules, 1996, deprived a married daughter from right of consideration for compassionate appointment, violates the equality clause and cannot be countenanced.

(29) The common string running through the aforesaid judgments of various High Courts is that they have given purposive and expansive interpretation to the meaning of the term 'family member'. The High Courts have risen to the occasion to include even married daughters within the meaning of family of dependent.

(30) Now, whether there is anything in the scheme dated 09.10.1998 which excludes a married or widowed daughter. No doubt, after the said scheme dated 09.10.1998 had been adopted by BSNL, in order to bring uniformity and transparency in the matter of compassionate appointment a weightage system has been introduced vide Corporate Office Order dated 27.06.2007. In the documents annexed with the said office order under the headings such as 'items with positive points' etc. and 'checklist with reference to weightage point system', no doubt, whenever there is reference to daughter it is referred as unmarried daughter, however, the said Office Memo dated 27.06.2007 only lays down the procedure to be followed while considering compassionate appointment. It does not lay down the eligibility for such consideration. The eligibility, in fact, is laid down in the Office Memo dated 09.10.1998 of the Government of India which has been adopted and applied by BSNL as is also mentioned in Office Memo dated 27.06.2007. Thus, the weightage point system introduced vide Office Memo dated

27.06.2007 by BSNL is only an action consequential to the main guidelines which are dated 09.10.1998 and is procedural in nature. It is the main guidelines dated 09.10.1998 which contain the substantive provision for entitlement to compassionate appointment, and not the Office Memorandum dated 27.06.2007, therefore, the Office Memorandum dated 27.06.2007 of BSNL cannot be understood and given a meaning contrary to or beyond the substantive provisions as contained in the O.M. dated 09.10.1998. We are to read and understand the Office Memorandum dated 27.06.2007 in the light of guidelines dated 09.10.1998 and not vice versa.

(31) The word 'daughter' used in the scheme is not preceded by the word 'unmarried' just as the word 'son' used in the scheme is not preceded by the word 'unmarried'. The absence of such prefix gives a reasonable basis to conclude that this definition does not exclude a 'married daughter', especially as the definition is an inclusive one, therefore, it has to be given an expansive meaning keeping in mind the object sought to be achieved. Although the word 'unmarried daughter' has been used in the proforma documents annexed with O.M. dated 27.06.2007 by which weightage point system was introduced but we have already stated that this O.M. cannot supplant the substantive provision contained in the O.M. dated 09.10.1998 as the weigtage point system merely provides a procedure and is not the substantive provision. Even otherwise, in view of what has been discussed hereinabove, the word unmarried daughter used in the documents annexed with the aforesaid O.M. would not be sustainable in view of the decisions referred hereinabove. Moreover, if a married son is eligible for compassionate appointment if he was dependent upon his father at the time of his death unless he had his own means of livelihood, then, there is no reason as to why a married daughter who is similarly placed, that is, if she was dependent upon her father, should not be eligible for compassionate appointment under the aforesaid scheme. Any distinction in this regard would be without any reasonable basis and without any link to the object sought to be achieved, therefore, it would be discriminatory and hit by Article 14 of the Constitution. Article 15(1) of the Constitution of India prohibits discrimination by the State against any citizen on grounds, inter alia, of sex. Likewise, Section 16(2) prohibits such discrimination on the grounds of sex in respect of any employment or office under the State. Thus, this Court finds that it is clear as a cloudless sky that any action/clauses of the policy which deprives a widowed daughter from a right of consideration for compassionate appointment if she was dependent upon her father, the deceased employee would run contrary to Article 14, 15, 16 read with 39A of the Constitution of India.

(32) In the light of decisions discussed hereinabove and the reasons given as aforesaid, we have no hesitation to hold that the words 'daughter (including adopted daughter)' occurring in Note-I of the Guidelines dated 09.10.1998 includes a married daughter, the only caveat is that such married daughter should be dependent upon her father/mother on the date of his/her death.

(33) Now the next question to be considered is whether a 'widowed daughter' would be included in the said definition. We are of the opinion that a 'widowed daughter' stands on a better footing than a married daughter as, prima facie with the

loss of her husband, she also loses her source of livelihood unless of course in the facts of a given case it is found that she is herself employed or has other means of sustenance which are adequate to sustain her in which case she may not have been dependent upon her father, but, unless this is proved, it would be reasonable to draw an inference that she was dependent upon her father unless of course there is evidence to the contrary.

(34) Even after marriage as also after her widowhood, she continues to be his daughter and her status as such continues even at the time of death of her father. Her widowhood occurred prior to the death of her father, therefore, she was for all legal and practical purposes daughter of late Om Prakash Bhakta although a widowed daughter, on the date of his death.

(35) Consequently, this Court holds that a 'widowed daughter' would be covered in the definition of 'daughter' contained in Note-I of the Guidelines dated 09.10.1998 if she was dependent upon her deceased father or mother on the date of his/her death. The question of dependency is one of fact which is to be determined by the authorities. If such widowed daughter was not dependent upon her father then she would not be entitled to compassionate appointment under the guidelines.

(36) For all the above said reasons, the respondent-BSNL could not have declined to consider the application of the petitioner for compassionate appointment merely because the petitioner was a widowed daughter on the date of death of her father.

(37) We have also gone through the judgment of Central Administrative Tribunal dated 13.01.2023 which is impugned herein and in view of the discussion already made, we find ourselves unable to agree with the decision given by it. In view of the reasons already given, the said judgment is not sustainable. It is, accordingly, quashed.

(38) The original application as also this petition is ***allowed***. The competent authority is directed to consider the claim of the petitioner for compassionate appointment in accordance with weightage point system prevalent and in doing so she shall be assigned points accordingly and her claim shall not be rejected on the ground that she was married or widowed daughter. The observations made hereinabove shall be adhered while taking a decision in this regard. A decision in this regard shall be taken within two months from the date of communication of a copy of this order.

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**(2024) 11 ILRA 619**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 27.11.2024**

**BEFORE**

**THE HON'BLE ABDUL MOIN, J.**

Writ A No. 11061 of 2024

**Dr. Gyanvati Dixit ...Petitioner**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Sudeep Kuma, Avdhesh Kumar Pandey, Shreshth Srivastava

**Counsel for the Respondents:**
C.S.C., Ashutosh Singh, Vijay Vikram

**A. Service Law – Suspension - Intermediate Education Act, 1921 - Section 16G(5) - The court/tribunal**

**should not mechanically set aside the order of punishment on the ground that the report was not furnished as is regrettably being done at present.**

The courts and tribunals should cause the copy of the report to be furnished to the aggrieved employee if he has not already secured it before coming to the court/tribunal and give the employee an opportunity to show how his or her case was prejudiced because of the non-supply of the report. If after hearing the parties, the court/tribunal comes to the conclusion that the non- supply of the report would have made no difference to the ultimate findings and the punishment given, the court/tribunal should not interfere with the order of punishment. (Para 20)

Hon'ble Supreme Court has propounded on the aspect of 'prejudice' that may be caused to an employee where he/she alleges some violation. In the instant case, the violation, as alleged, is non issuance of the formal order of reinSt.ment. Petitioner neither in his arguments nor in the petition has indicated anywhere as to the prejudice that may have been caused to him on account of non issuance of the formal order of reinSt.ment after his suspension order was quashed. In the absence thereto, **merely because no formal order was issued prior to placing the petitioner under suspension, the same, in the opinion of the Court, will not vitiate the impugned suspension order as no prejudice has been caused to him.** (Para 21)

**B. Non passing of a formal order of reinSt.ment can also be seen in context of 'Useless Formality Theory'.** (Para 22)

Once the petitioner had only been placed under suspension vide order dated 04.10.2024, which had been quashed by the writ court vide judgment and order dated 05.11.2024. Consequently, the petitioner can be deemed to have been reinSt.d in service. Thus merely because a formal order of his reinSt.ment was not passed prior to he again being placed under suspension by means of the order impugned the same would clearly fall within the ambit of Useless Formality Theory. (Para 23)

**C. Unless there is a failure of justice, the Court may refuse to exercise the extraordinary jurisdiction with which it is vested**. Merely because a formal order of reinSt.ment was not passed prior to the petitioner being placed under suspension, there has been no failure of justice and as such, this court refuses to exercise the extraordinary jurisdiction. (Para 24)

**D. Perusal of the suspension order would indicate that the same had been passed both under the provisions of Section 16G(5)(a) and (b).** Suspension could not have been ordered without an enquiry been initiated as provided u/s 16G(5)(b) of the Act, 1921 yet a perusal of the suspension order would indicate that the same has also been passed under the provisions of Section 16G(5)(a) of the Act, 1921 also and thus once the charges are serious as such the suspension order would squarely be covered by the provisions of Section 16G(5)(a) of the Act, 1921 and thus the petitioner has correctly been placed under suspension in terms of the aforesaid provisions. (Para 30)

No opinion with regard to provisions of Section 16G(5)(b) of the Act, 1921 has been expressed that without issuance of a charge-sheet the suspension order cannot be passed and the said question is left open to be considered in an appropriate case.

**Writ Petition dismissed**. (E-4)

**Precedent followed:**

1. The Regional Director, Employees' St. Insurance Corporation Vs M/s Popular Automobiles Etc., AIR 1997 SC 3956 (Para 17)

2. Public Services Tribunal Bar Association Vs St. of U.P. & anr., 2003 (4) SCC 104 (Para 17)

3. Khem Chand Vs U.O.I., 1963 AIR 687 SC (Para 17)

4. Canara Bank & ors. Vs Debasis Das & ors., 2003 (4) SCC 557 (Para 20)

5. M.C. Mehta Vs U.O.I. & ors., 1997 (2) SCC 353 (Para 22)

6. Gadde Venkateswara Rao Vs Government of Andhra Pradesh & ors., 1996 AIR 828 SC (Para 24)

**Precedent distinguished:**

1. In Re Lal Bahadur Singh Vs U.P. St. Roadways Transport Corporation & ors., Special Appeal No. 305 of 2007 (Para 7)

2. Anand Narain Shukla Vs St. of M.P., (1980) 1 SCC 252 (Para 7)

3. Salma Bi Vs Collector, Buladana & ors., 2022 SCC OnLine Bom 273 (Para 7)

4. Managing Director of ECIL Vs B. Karunakar, 1993 (4) SCC 727 (Para 7)

**Present petition assails order dated 09.11.2024, by which the petitioner has been placed under suspension.**

(Delivered by Hon'ble Abdul Moin, J.)

1. Affidavit of compliance filed by Shri Ashutosh Singh, learned counsel appearing on behalf of the respondent No.5 is taken on record.

2. Heard learned counsel for the petitioner, learned Standing Counsel for the State-respondents and Shri Ashutosh Singh, learned counsel appearing on behalf of the respondent No.5.

3. Under challenge is the order dated 09.11.2024, a copy of which is Annexure-1 to the petition, by which the petitioner has been placed under suspension.

4. Raising a challenge to the said order, the contention is that earlier the petitioner had been suspended vide order dated 04.10.2024, a copy of which is Annexure-9 to the petition.

5. A challenge had been raised to the said suspension order by filing Writ A No.9746 of 2024 In Re Dr Gyanvati Dixit vs State of U.P. & Ors. This Court vide judgment and order dated 05.11.2024, a copy of which is Annexure-2 to the petition, quashed the said suspension order. It was further directed that consequences would follow. Further, it was left open for the competent authority to pass a fresh order, if required, in accordance with law.

6. Contention of the learned counsel for the petitioner is that without reinstating the petitioner in pursuance of the order of this Court dated 05.11.2024, the petitioner again has been placed under suspension which could not have been done by the respondents inasmuch as once the petitioner had been placed under suspension vide the earlier order dated 04.11.2024, employer-employee relationship stood suspended and without the said relationship being restored by passing of a consequential order in terms of the order of this Court dated 05.11.2024, the petitioner could not again have been placed under suspension.

7. In this regard, learned counsel for the petitioner has placed reliance on the judgment of Hon'ble Supreme Court in the case of ***Managing Director of ECIL vs B. Karunakar : 1993 (4) SCC 727*** (Para 31), a Division Bench judgment of this Court passed in ***Special Appeal No.305 of 2007 In Re Lal Bahadur Singh vs U.P. State Roadways Transport Corporation & Ors***, judgment of Hon'ble Supreme Court in the case ***Anand Narain Shukla vs State of Madhya Pradesh : (1980) 1 SCC 252*** as well as a judgment of Bombay High Court in the case of ***Salma Bi vs Collector, Buldana & Ors : 2022 SCC OnLine Bom 273.***

8. Learned counsel for the petitioner further argues that perusal of the impugned

suspension order would indicate that the petitioner has been placed under suspension in view of the provisions of Section 16G(5)(b) of the U.P. Intermediate Education Act, 1921 (hereinafter referred to as 'Act, 1921'). However, the aforesaid provision will only be attracted and applicable in case his continuance in office is likely to hamper or prejudice the conduct of disciplinary proceedings against him, but no enquiry was initiated at the time of passing the suspension order and thus, the suspension order reflects patent non application of mind.

9. No other ground has been urged.

10. Responding to the first submission of the learned counsel for the petitioner, learned counsel appearing for respondent No.5 argues that once this Court vide judgment and order dated 05.11.2024 had quashed the suspension order dated 04.10.2024 as such the reinstatement followed automatically and there was no requirement to pass a separate order for the same. This would be apparent from the fact that while passing the impugned suspension order dated 09.11.2024, the petitioner has been addressed as the Principal of the Institution as specifically finds place in the order.

11. Responding to the second argument of the learned counsel for the petitioner, argument of learned counsel for respondent No.5 is that a perusal of the impugned suspension order would indicate that same has been passed under the provisions of Sections 16G(5)(a) and 16G(5)(b) and even if the argument raised by the petitioner with regard to Section 16G(5)(b) is upheld yet the suspension order can still be sustained considering that the charges levelled against the petitioner are serious enough to merit her dismissal.

12. Heard learned counsel for the parties and perused the record.

13. From the argument as raised by the learned counsel for the petitioner and from perusal of the record, it emerges that earlier the petitioner has been suspended vide order dated 04.10.2024. Upon a challenge being raised to the said suspension order this Court vide judgment and order dated 05.11.2024 had quashed the suspension order and provided that consequences would follow. However, it was left open for the competent authority to pass a fresh order, if required, in accordance with law.

14. Again the petitioner has been placed under suspension vide order dated 09.11.2024. The order has been passed under the provisions of Section 16G(5) of the Act, 1921.

15. The grounds urged by the learned counsel for the petitioner in order to challenge the said order are (a) that the said suspension order has been passed without reinstating the petitioner after the earlier suspension order had been quashed by this Court and this Court had specifically provided that consequences are to be follow; and (b) that the suspension order has been passed under the provisions of Section 16G5(b) of the Act, 1921, which order could only be passed in case disciplinary proceedings are being conducted but as no disciplinary proceeding have been initiated against the petitioner, the same thus reflects patently non application of mind and consequently, suspension order merits to be quashed.

16. As regards the first ground i.e. the suspension order having been passed without reinstating the petitioner, suffice to state that during the period of suspension employer-employee relationship does not come to an end. The employee is only prohibited from actually offering his services and discharging his duties and further during the suspension pending enquiry the remuneration is payable to the employee concerned.

17. In this regard, it would be suffice to refer to the judgments of the Supreme Court in the case of

18. Once the employer-employee relationship continues thus in terms of Section 16G(5) of the Act, 1921, which pertains to the suspension of the head of institution or teacher and the provision under which the petitioner has been suspended, the same categorically provides that it is the head of the institution or teacher who can be suspended by the management on the grounds as contemplated under the said section. As the earlier suspension order of the petitioner had already been quashed by this Court vide judgment and order dated 05.11.2024 and even if no formal order has been passed by the respondents reinstating the petitioner, the same would not take away the fact or the suspension order itself having been quashed and consequently the petitioner cannot be said to be a suspended employee on the date of passing of the fresh suspension order, in this case as on 09.11.2024 and thus in case no formal order was passed for the reinstatement of the petitioner the same would not vitiate the suspension order on the ground as urged by the petitioner.

19. Even otherwise if no formal order was passed in the case of the petitioner reinstating him, the same would have to be seen in the context of the prejudice that may have been caused to the petitioner.

20. This aspect of the matter has been considered by the Hon'ble Supreme Court in the case of ***Canara Bank And Ors vs Debasis Das And Ors : 2003 (4) SCC 557*** wherein the Hon'ble Supreme Court has held as under:-

***"24. Additionally, there was no material placed by the employee to show as to how he has been prejudiced.*** *Though in all cases the post-decisional hearing cannot be a substitute for pre-decisional hearing, in the case at hand the position is different. The position was illuminatingly stated by this Court in Managing Director, ECIL v. B. Karunakar [Managing Director, ECIL v. B. Karunakar, (1993) 4 SCC 727 : 1993 SCC (L&S) 1184 : (1993) 25 ATC 704] (SCC at p. 758, para 31) which reads as follows:*

*"31. Hence, in all cases where the enquiry officer's report is not furnished to the delinquent employee in the disciplinary proceedings, the courts and tribunals should cause the copy of the report to be furnished to the aggrieved employee if he has not already secured it before coming to the court/tribunal* ***and give the employee an opportunity to show how his or her case was prejudiced because of the non-supply of the report. If after hearing the parties, the court/tribunal comes to the conclusion that the non-supply of the report would have made no difference to the ultimate findings and the punishment given, the court/tribunal should not interfere with the order of punishment. The court/tribunal should not mechanically set aside the order of punishment on the ground that the report was not furnished as is regrettably being done at present****. The*

*courts should avoid resorting to short cuts. Since it is the courts/tribunals which will apply their judicial mind to the question and give their reasons for setting aside or not setting aside the order of punishment, (and not any internal appellate or revisional authority), there would be neither a breach of the principles of natural justice nor a denial of the reasonable opportunity. It is only if the court/tribunal finds that the furnishing of the report would have made a difference to the result in the case that it should set aside the order of punishment. Where after following the above procedure, the court/tribunal sets aside the order of punishment, the proper relief that should be granted is to direct reinstatement of the employee with liberty to the authority/management to proceed with the inquiry, by placing the employee under suspension and continuing the inquiry from the state of furnishing him with the report. The question whether the employee would be entitled to the back wages and other benefits from the date of his dismissal to the date of his reinstatement if ultimately ordered, should invariably be left to be decided by the authority concerned according to law, after the culmination of the proceedings and depending on the final outcome. If the employee succeeds in the fresh inquiry and is directed to be reinstated, the authority should be at liberty to decide according to law how it will treat the period from the date of dismissal till the reinstatement and to what benefits, if any and the extent of the benefits, he will be entitled. The reinstatement made as a result of the setting aside of the inquiry for failure to furnish the report, should be treated as a reinstatement for the purpose of holding the fresh inquiry from the stage of furnishing the report and no more, where such fresh inquiry is held. That will also be the correct position in law."*

*(Emphasis supplied)*

21. On perusal of the judgment in the case of ***Debasis Das (supra),*** it emerges that the Hon'ble Supreme Court has propounded on the aspect of 'prejudice' that may be caused to an employee where he/she alleges some violation. In the instant case, the violation, as alleged, is non issuance of the formal order of reinstatement. The learned counsel for the petitioner neither in his arguments nor in the petition has indicated anywhere as to the prejudice that may have been caused to him on account of non issuance of the formal order of reinstatement after his suspension order was quashed. In the absence thereto, merely because no formal order was issued prior to placing the petitioner under suspension, the same, in the opinion of the Court, will not vitiate the impugned suspension order as no prejudice has been caused to him.

22. Non passing of a formal order of reinstatement can also be seen in context of 'Useless Formality Theory' as enunciated by the Hon'ble Supreme Court in the case of ***M.C. Mehta vs Union Of India & Ors : 1997 (2) SCC 353.***

23. The reason as to why the said principle may be attracted in the facts of the instant case is that once the petitioner had only been placed under suspension vide order dated 04.10.2024 which suspension order had been quashed by the writ court vide judgment and order dated 05.11.2024 consequently the petitioner can be deemed to have been reinstated in service. Thus merely because a formal order of his reinstatement was not passed

prior to he again being placed under suspension by means of the order impugned the same would clearly fall within the ambit of Useless Formality Theory as per the judgment of the Hon'ble Supreme Court in the case of ***M.C. Mehta (supra).***

24. Even otherwise considering the law laid down by the Hon'ble Supreme Court in the case of ***Gadde Venkateswara Rao vs Government Of Andhra Pradesh And Others : 1966 AIR 828 SC*** wherein the Hon'ble Supreme Court has held that unless there is a failure of justice, the Court may refuse to exercise the extraordinary jurisdiction with which it is vested, as such, this Court is of the view that merely because a formal order of reinstatement was not passed prior to the petitioner being placed under suspension, there has been no failure of justice and as such, this court refuses to exercise the extraordinary jurisdiction.

25. As already indicated above, once the earlier suspension order of the petitioner had been quashed consequently even if the respondents failed to pass a formal order of reinstatement, the same will not and cannot take away the power of the respondents to again place the petitioner under suspension as has clearly been done in the instant case. Thus, the aforesaid ground does not appeal to the Court and is accordingly rejected.

26. So far as judgment of the Hon'ble Supreme Court in the case of ***Anand Narain Shukla (supra)*** is concerned, the same has no applicability of the facts of the instant case inasmuch the Hon'ble Supreme Court has considered the reversion of the employee concerned to be one of reinstatement while in the instant case the petitioner had been placed under suspension.

27. So far as judgment of this Court in the case of ***Lal Bahadur Singh (supra)*** is concerned, the said judgment was a case of dismissal order having been quashed leaving it open to the respondents to conduct a fresh enquiry. In those circumstances, this Court had held that a fresh enquiry could only be conducted after the employee concerned was reinstated in the services and without reinstatement the enquiry could not have been conducted. In the instant case again it is not a case of the petitioner having been dismissed or removed from the service rather he had only been placed under suspension and thus the said judgment would have no applicability to the facts of the instant case.

28. So far as the judgment of the Bombay High Court in the case of ***Salma Bi (supra)*** is concerned, the same would have no applicability to the facts of the instant case inasmuch as the same is a case pertaining to an election dispute while the instant case pertains to a service matter.

29. So far as the judgment of the Supreme Court in the case of ***B. Karunakar (supra)*** is concerned, para 31 pertains to a reinstatement of an employee, which again would have no applicability to the facts of the instant case.

30. As regards ground (b), suffice to state that perusal of the suspension order would indicate that the same had been passed both under the provisions of Section 16G(5)(a) and (b). Even if for the sake of the argument, the aforesaid ground as urged by the petitioner is considered to be valid that suspension could not have been ordered without an enquiry been initiated

as provided under Section 16G(5)(b) of the Act, 1921 yet a perusal of the suspension order would indicate that the same has also been passed under the provisions of Section 16G(5)(a) of the Act, 1921 also and thus once the charges are serious as such the suspension order would squarely be covered by the provisions of Section 16G(5)(a) of the Act, 1921 and thus the petitioner has correctly been placed under suspension in terms of the aforesaid provisions.

31. The Court would like to add that it has not expressed any opinion with regard to provisions of Section 16G(5)(b) of the Act, 1921 that without issuance of a charge-sheet the suspension order cannot be passed and the said question is left open to be considered in an appropriate case.

32. Keeping in view the aforesaid discussion, no case for interference is made out. Accordingly, the writ petition stands ***dismissed.***

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